Public Utilities

FORTNIGHTLY

April 3, 1930

VALUATION YARDSTICKS

By Dr. John Bauer

¶ *TOGETHER with other editorial features and departments of review and commentary upon the economic, financial, political, and legal aspects of utility regulation.*

PUBLIC UTILITIES REPORTS, INC.
PUBLISHERS

THE FARMER HAS USE FOR MANY TIMES MORE ELECTRICITY THAN THE AVERAGE CITY HOUSEHOLDER

Farm electrification . . *achievement and opportunity*

The helping hand of electricity today is reaching far beyond the limits of thickly populated areas. Already three hundred and fifty thousand farms are enjoying the same electrical service that is available in cities, while almost an equal number have installed independent electrical service plants. The next five years, it is conservatively predicted, will see a million more farms electrified.

Home and barnyard lighting is only a small part of the service that electricity can perform for the modern farmer. Milking, threshing, pumping and irrigating are broad fields for electric power in agriculture. The lighting of poultry houses increases egg production. Cooking and water-heating with electricity are now economical realities. And thousands of farmers are finding that electric refrigeration pays for itself in better prices for milk and cream.

Westinghouse developed much of the equipment that made extensive farm electrification possible. The first manufacturer to provide a generating service that required no attention from month to month, Westinghouse also introduced the automatic electric range and developed the automatic storage water heater. Westinghouse supplies a complete line of household appliances and motors and controls to fit every farm need. And Westinghouse holds the good-will of the farmer by extending its factory service through service shops strategically located in all sections of the country.

Westinghouse Electrification Wiring

The Sign of a Westinghouse Dealer

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Public Utilities Fortnightly

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Contents of previous issues of PUBLIC UTILITIES FORTNIGHTLY *can be found by consulting the "Industrial Arts Index" in your library.*

PUBLIC UTILITIES REPORTS, INC., PUBLISHERS

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Pages with the Editors

AN Irate Subscriber got so wrought up over a recent article in PUBLIC UTILITIES FORTNIGHTLY that he could not wait to express his opinions of the Editors by mail—he used the long-distance telephone.

* *

THE Irate Subscriber was no colorless man of mere opinions; he was a man of definite convictions; he not only objected to the presence of a Certain Contributor in our editorial pages, but also to the views on utility regulation which that contributor expressed.

* *

"How," was the substance of his message, "did *he* get into your columns?"

* *

OUR reply was that he was invited in.

* *

HE was invited in because he is an influential leader of public opinion, because he advocates certain policies for the regulation of utilities, and because he is a person to be reckoned with in the solution of the economic, political, and legal problems that confront the utilities.

* *

THE fact that his views are or are not shared by the Irate Subscriber; the fact that his views are or are not shared by many or even by most of the readers of PUBLIC UTILITIES FORTNIGHTLY; the fact that his views may or may not be eventually enforced by legislation, or even whether they are sound or unsound, is beside the point.

* *

DR. JOHN BAUER
(*See page* 395)

THE point is that the Certain Contributor is an outstanding publicist whose ideas may be rejected or espoused but cannot be ignored; to dismiss them merely because one discredits them is to close one's mind against facts and factors after the manner of the ostrich—who is generally regarded as Not Quite Bright.

* *

THE Irate Subscriber was appeased only when the Editors invited him to express his own opinions in the pages of this magazine, in answer to the article which inspired his protest.

* *

THE incident recalls the ancient but merry story of the small boy who, while cautiously crawling on his hands and knees in an effort to squeeze under the circus tent, was spied by one of the trained asses and was catapulted by the animal's heels straight into the arms of a uniformed attendant inside.

* *

"HEY, you!" the guardian of the law asked, "how did *you* get in?"

* *

"I WAS assed in," was the apt reply.

* *

THE Editors propose to ask for the opinions of other pulicists and economists.

* *

IN the coming issues of PUBLIC UTILITIES FORTNIGHTLY will appear the views of contributors of many and conflicting shades of opinion on matters of regulation—contributors who have been invited and conscripted as well as contributors who have volunteered.

* *

IN the next number, for instance, COMMISSIONER FRANCIS T. SINGLETON, of Indiana, will present a plea for the appointment of "Public Defenders" to present the ratepayers in the hearings before the Commissions and the Courts.

* *

THIS proposal touches upon the subject that brought about the break between GOVERNOR FRANKLIN D. ROOSEVELT of New York and former Chairman WILLIAM A. PRENDERGAST of the Public Service Commission; the former maintained that the function of a Commission is to present the case of the ratepayer only—as a sort of collective body of "Public Defenders"—while the latter maintained that the Commission should be an impartial tribunal that seeks to hold even the scales of justice between the public on one hand and the utilities on the other.

(*Continued on page VIII*)

COMMISSIONER HAROLD E. WEST
(*See page* 416)

COMMISSIONER SINGLETON'S proposal has been in part anticipated; Maryland and the District of Columbia already have such officers; they are designated as "People's Counsels;" other states are considering the creation of similar offices.

* *

THE appointment of such legal talent assumes that the Commissions play *quasi*-judicial roles; that they are in fact tribunals without bias in the adjustment of the regulatory problems that come before them—as was pointed out by MR. SPURR in his article in the March 20th issue of this magazine.

* *

THE fact that COMMISSIONER SINGLETON believes that a Public Defender—a counsel whose duty it is to present the interests of the ratepayers specifically—would increase the efficiency of the State Commissions and aid in attaining equitable solutions of the controversies that reach the regulatory bodies, constitutes evidence that at least the Indiana Commission does not regard itself as a mere group of Public Defenders but rather as an impartial and unprejudiced tribunal.

* *

ALL of the contributors to this issue of PUBLIC UTILITIES FORTNIGHTLY have already been introduced to our readers in previous issues and consequently make their reappearance now as old friends.

* *

DR. JOHN BAUER is a rate expert of New York who has figured prominently in the recent hearings before the New York Committee on the Revision of the Public Service Commission Laws; he is the father of the "Bauer Plan" for establishing a standard method of determining valuations for rate-making purposes—a plan which DR. BAUER describes on pages 395 to 405 of this number.

AARON HARDY ULM (who summarizes the activities of the Interstate Commerce Committee of the U. S. Senate on pages 406 to 414), is a newspaper man of Washington, D. C., and a frequent contributor to the magazines.

* *

HENRY C. SPURR is of the staff of this magazine.

* *

HAROLD E. WEST, Chairman of the Public Service Commission of Maryland, comes vigorously to the defense of the public service commissions (whose efficiency as a group was questioned by SENATOR GEORGE W. NORRIS in our March 6th issue), on pages 416 to 433.

* *

THE striking frontispiece in this issue (page 394) is representative of the work of HUGH FERRISS, whose imaginative drawings have been attracting international attention.

* *

MR. FERRISS is a New York architect by profession, but his renderings of present-day structures and his conception of the cities and industrial centers of the future have led him into the realms of art that extend beyond the confines of the engineering office.

* *

IN his recently-published book "The Metropolis of Tomorrow," (Ives Washburn, New York), MR. FERRISS presents three groups of drawings; one group pictures the structures of today; one visualizes the city of tomorrow as it may appear if certain trends are maintained, and the third group illustrates an imaginary metropolis in the dim future.

* *

THE Editors are indebted to both MR. FERRIS and the publisher for permission to reproduce this example of the artist's work.

* *

AMONG the interesting rulings reported in the *Public Utilities Reports* section of this issue are the following:

* *

When a franchise runs out in North Dakota the grant of a new franchise to a competing company is not sufficient to show any need of another system in the city, in the opinion of the North Dakota district court. Nor is this second grant enough to end the right of the first company to operate. (See page 115.)

* *

AN electric utility in North Carolina was met with the problem of dealing with a section of its distribution system where a majority of the customers had refused to pay their current bills. The utility refused further service, but the customers reconnected their service. The Commission ruled that the company had a right to discontinue that section of the distribution system. (See page 146.)

—THE EDITORS.

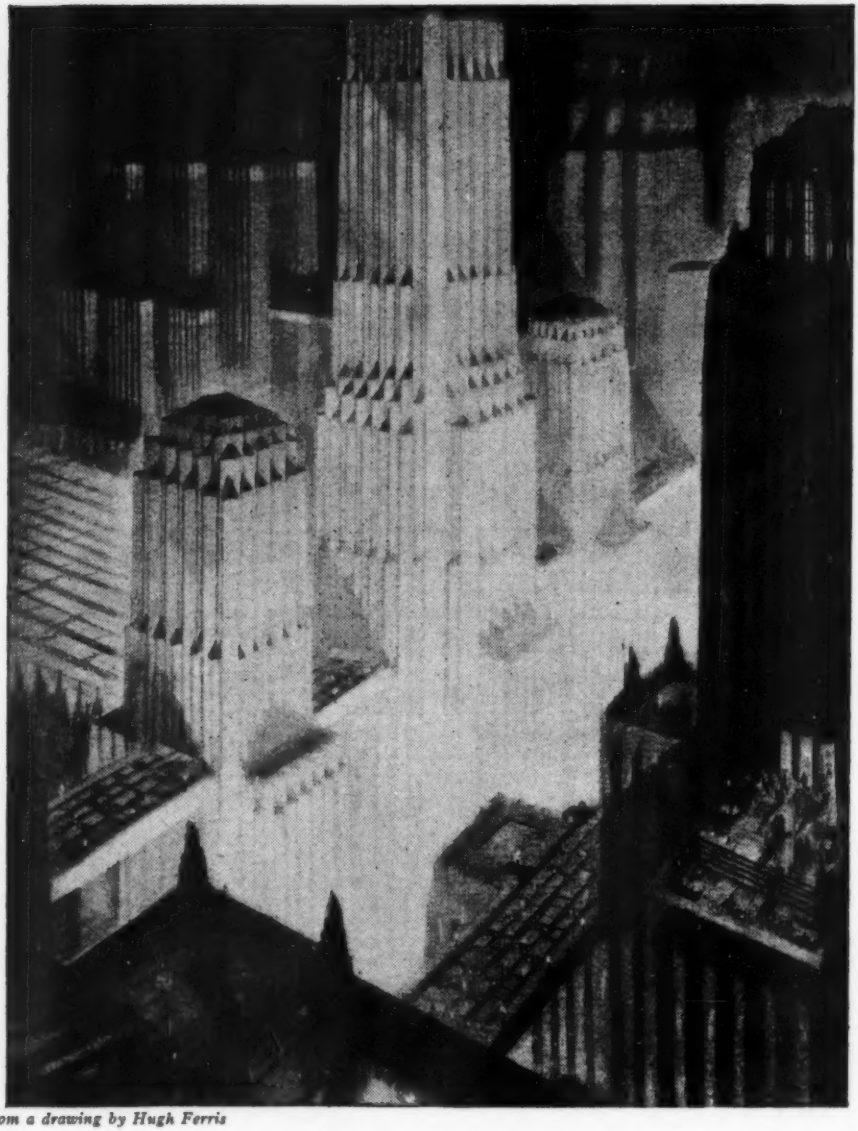
APRIL

Reminders of Coming Events — **ALMANACK** — *Notable Events and Anniversaries*

3	T^{h}	The act of the Texas legislature, creating the Railroad Commission, was approved, 1891. Delaware & Hudson Canal & Railroad Co. was chartered, 1823.
4	F	The first train operated by the Atchison, Topeka & Santa Fe Railroad ran from Topeka to Wakarusa, 1869. First pictures transmitted by wire, 1925.
5	S^{a}	JOHN FITCH, a Connecticut Yankee, demonstrated a steam-propelled sidewheeler on a pond in Bucks Co., Pa., 22 years before the *Clermont*, 1785.
6	S	The legislative act creating the State of Kentucky Railroad Commission was signed, 1882.
7	M	On the 51st anniversary of the issuance of patent rights to BELL'S first telegraph, scientists gave a demonstration of television by both wire and radio, 1927.
8	T^{u}	The unprosperous state of the railroads was shown by the report of the Interstate Commerce Commission; 106 out of 200 roads failed to earn expenses; 1921.
9	W	ROOSEVELT'S "trust busting" campaign reached its climax with the decision that the merger of the railroads in the Northern Securities Co. was illegal, 1903.
10	T^{h}	THALES, a Greek philosopher, created the first electrical phenomenon of historical record when he rubbed amber on a cat's fur, 600 B. C.
11	F	Steamship owners contested the right of way of the great railroad bridge over the Mississippi at Rock Island, upon its official opening, 1856.
12	S^{a}	The Public Service Commission of the State of Missouri was created by an act of the legislature, 1913.
13	S	GEORGE WESTINGHOUSE, a young inventor of 22, obtained his first patent on his air-brake which was destined to revolutionize railroad travel, 1869.
14	M	JIM MOORE, one of the riders in the famous "Pony Express," made a world's record when he speeded his horse 280 miles in 22 hours, 1860.
15	T^{u}	The legislative act creating the Public Service Commission of the State of New Hampshire was approved, 1911.
16	W	Daylight saving, which is decreed by various states and cities, and which variously affects public utility revenues, will go into effect this month.

"Business dispatched is business well done,
but business hurried is business ill done."

—BULWER-LYTTON



From a drawing by Hugh Ferris

The Future City

If the business structures of today grow higher and higher, will not the juxtaposed towers and the congestion of traffic below become disturbingly reminiscent of the Tower of Babel? "One is tempted to imagine the scene at night, with geometrical lights flaring in the cbyss," observed the artist; his startling conception is well within the realms of possibilities.

Public Utilities
FORTNIGHTLY

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Valuation Yardsticks

The Bauer and the Prendergast Plans

OUT of the recently completed hearings before the New York Commission on Revision of the Public Service Commission Law (the printed records of which occupy nearly two feet of shelf room), are emerging several constructive proposals for strengthening the present system of regulation. Among them are several plans for establishing a standard method of determining valuations for rate-making purposes. The author of one of these plans here sets forth its purposes and its method of operation.

BY DR. JOHN BAUER

A YEAR ago a long-smouldering outburst occurred against the Public Service Commission of New York. The flare-up brought forth innumerable and varied expressions of opinion, ranging from those of the implacable critics of the whole regulatory system, who can see nothing but evil in any form of control over public utilities this side of out-and-out government ownership and operation, to those of the more conservative students of political economy who believe that the present Commission form of regulation is correct in principle and requires only minor readjustments to rectify the occasional faults that are revealed in practice.

The fact that the newly inaugurated Governor of New York, Franklin D. Roosevelt, was a Democrat who was elected to office on a platform that included a plank which provided for the development by the state of New York's water power resources, while the Chairman of the Commission, William A. Prendergast, was a Republican and an advocate of the present system of regulation, injected a political note into a situation that is essentially economic. Both agreed,

however, that the Commission had not been consistently functioning to best advantage. To what extent and in what particulars this was true, and the reasons therefor, were matters to be determined.

IN order to find out the facts of the case, and to consider the many and conflicting viewpoints, Governor Roosevelt and the state legislature followed the Hoover policy of appointing a commission. It was given the cumbersome but self-explanatory title of "The New York Commission on Revision of the Public Service Commission Law."

This commission was appointed under the provision of a resolution adopted during the 1929 session of the state legislature. It consisted of nine members—three appointed from the State Senate, three from the Assembly, and three by the Governor.[1]

Its purpose was to determine how public utility regulation has worked since its introduction in 1907, what defects have developed, and what changes should be made in the law so as to make regulation more satisfactory from the public standpoint. Early last summer it adopted a comprehensive program of investigation. It appointed Hon. William J. Donovan, formerly Assistant Attorney General of the United States as counsel. It engaged also special experts to investigate the principal phases of regulation, both in the state of New York and elsewhere. The writer was selected to make a special study of valuation and rate making.

THE Commission started its formal hearings in October, 1929, and continued through the greater part of January of the present year. It received not only reports from the technical experts, but gathered testimony from a large number of persons. William A. Prendergast, Chairman of the New York State Public Service Commission, occupied the witness stand several days, explaining the organization and work of his Commission. Invitations were extended to scores of individuals who, through their experience, might furnish valuable suggestions,—including members of Commissions in other states, engineers, economists, lawyers, public utility executives, and students of public affairs.

While many criticisms were made of the present system of regulation in New York, as well as of the personnel of the Commission, the reports and testimony showed that the fundamental difficulty has appeared in valuation and rate making. While the Commission has other important responsibilities, its chief duty has been to assure the public reasonable rates; that this function has not been carried out in a satisfactory manner was admitted by Chairman Prendergast and other members of the Commission, and was affirmed by virtually all witnesses who had had close contact with rate control.

WHILE the difficulty met by the Commission may be due in part to personnel and inadequacy of its staff, the chief fault was almost generally assigned to the present legal

[1] The Senate members are, Hon. John Knight, Chairman, William J. Hickey, Warren T. Thayer; Assembly members: Joseph A. McGinnies, Horace M. Stone, and Russell G. Dunmore; Governor's appointees: Frank P. Walsh, James C. Bonbright, and David C. Adie.

system of regulation. The situation may be briefly summarized as follows:

(a) The "fair value" upon which a company has had the right to receive a return has not been based upon a definite and coherent economic conception; it has not been precisely defined; and has been dependent upon various elements, without exact basis of fact and without fixed weight relative to each other. Hence, the determination of the amount has been subject to dispute both as to principles and facts; it has aroused conflict of interest between the companies and the public, and has made procedure cumbersome and expensive. This condition had turned rate making, from an administrative process, into a judicial proceeding, contrary to the purpose of the law and the proper function of the Commission as an active administrative agency in the public interest.

(b) The amount of "fair value" has been, moreover, a variable quantity, subject to redetermination with changing prices and costs, and, in view of the numerous properties under the jurisdiction of the Public Service Commission, the task of successive readjustments has been impossible of performance. Hence, neither increases nor reductions in rates could be effected promptly as reasonably required for the proper protection of the companies and the public.

(c) The companies have provided a large proportion of the capital invested in public service properties through the issuance of bonds, notes, and other securities, which fix by contract the return received by the investors, and have provided a smaller proportion of capital through the issuance of common stock, which does not limit by contract the returns to the investors. Hence, as the "fair value" of an entire property has increased or decreased with changing prices and property costs, and as the rate of return has varied with changing conditions, there has been a disproportionate effect upon the return available for the common stock. This fact has caused financial instability among the companies, not only subjecting the securities to speculative forces, but stimulating excessive property expansions during periods of unduly increasing returns, and retarding new construction as reasonably needed during periods of unduly decreasing returns.

(d) In dealing with public utilities, the law of the state has intended to assure the public reasonable rates, to provide the investors a fair and adequate return, to preserve financial stability among the companies, and to make available new capital funds as reasonably needed for the public service. These purposes have not been, and cannot be, reasonably achieved under the old system of control, because of the indefiniteness and variability of "fair value" and rate of return, and because of the prevailing financial structure of the companies. For the effective realization of the above stated objects, there must be established a definite and non-fluctuating valuation (or rate base) and rate of return, subject to continuous accounting control and determination.

THE situation thus presented points to the necessity of aban-

doning the "fair value" standard, and adopting a fixed rate base which would not fluctuate with changing prices and other conditions, and which could be kept under continuous accounting determination and control. This change is required not only as a means of protecting the interest of the public at large, but of defining and preserving the rights of the investors, and particularly, making the administration of rate making practicable. The "fair value" standard is basically objectionable, not because it imposes higher rates than are really fair to the public—(for it may result in lower charges than are just to the investors)—but because of its indefiniteness and variability. It does not furnish a usable yardstick of rights and responsibilities. It cannot be effectively employed for the systematic administration of rate making when a Commission has to deal with over eight hundred properties operated under greatly varying conditions. It inevitably leads to inaction and breakdown of regulation.

THE inquiry of the revision commission into the feasibility of establishing a fixed rate base, produced two plans which were presented for comment to the technical witnesses.

The first plan was proposed by the writer, and was generally referred to as the "Bauer Plan."

The second plan was offered by Chairman Prendergast of the Public Service Commission, and was known as the "Prendergast Plan."

Both plans were predicated upon the fact that the present "fair value" standard involves basic difficulties, which reasonably preclude its permanent retention for public rate control, and that definiteness and stability of rate base are essential for satisfactory administration of rate making, as well as for just dealing with investors and the public. The first plan received the more extensive consideration because it had been worked out in complete detail as to set-up and administrative procedure; the second plan was offered more casually, to meet what seemed to Mr. Prendergast as important objections to the Bauer plan.

THE Bauer plan proposed a new standard of regulation to be provided for by direct legislation as a matter of public policy. It would seek to meet expressly by statutory enactment the difficulties of the present system. It would draw a sharp distinction between properties existing at the time the new policy is adopted, and all subsequent utility investments. As for existing properties, it would provide for valuations on the basis of conditions then prevailing,—technically referred to as "initial valuations." They would be made by the Public Service Commission under general provisions of the statute, and would take into account all factors which should receive reasonable consideration,—actual cost, reproduction cost, general expenditures, going value, and deduction for depreciation due to physical wear, obsolescence, and other functional causes. They would also give due weight to the fact that the amounts once fixed would remain permanent, not subject to further redetermination, whatever changes might occur in

The Bauer Plan Provides for—

(1) *The rewriting of every company's property accounts to show the initial valuation;*

(2) *The addition to this amount of all subsequent investments;*

(3) *The placing of both of these factors under continuous accounting control, maintained through charges to operating expenses, depreciation, and other reserves.*

At any given time after the establishment of the initial valuation, the rate base would consist of all the balances of the property accounts, less balances of the depreciation reserve and other operating reserves. It would stand as a definite fact, and would furnish an indisputable measure both as to the rights of the investors and the obligation of the public. And it would be subject to continuous accounting administration.

prices and construction costs. They would be fixed once for all, to include for each company all properties used and useful, with the intention of fairness to both investors and the public at large, from the standpoint of conditions at the time of the valuation.

As the first step in the establishment of a fixed rate base, the property accounts of every company would be rewritten to show the initial valuation. To this amount would be added all subsequent investments as made, subject to determination and approval by the Public Service Commission. The properties included both in the initial valuation and subsequent investments would be kept under continuous accounting control, and would be fully maintained through charges to operating expenses, including depreciation, and ample provisions would be made also for other desirable reserves. At any given time after the establishment of the initial valuation, the rate base would consist of all the balances of the property accounts, less balances of the depreciation reserve and other operating reserves. It would stand as a definite fact, and would furnish an indisputable measure both as to the rights of the investors and the obligation of the public. It would be subject to continuous accounting administration.

The plan thus provides for actual investment with respect to all additions after the initial valuation. But as to properties in use at the time the new policy is adopted, there would be a valuation to take into account all factors which should have weight in fixing a sum which would be really fair both to investors and the public.

It would not involve any retroactive application of actual cost to properties which had not been subjected to that measure when they were installed. It would start with the fact that heretofore the "fair value" standard has prevailed and must, therefore, be given due consideration in establishing a new system of a fixed rate base. So far as subsequent investments are concerned, the plan assumes that the legislature would have the right, in the public interest, to define the terms under which new capital may be invested in the public service. But as to prior properties, the "fair value" standard could not be ignored, but it could not be taken either to preclude the establishment of an equivalent sum as a fixed and unchanging quantity for future rate base. The chief task would be to determine a reasonable equivalent for the indeterminate and variable "fair value."

THE Prendergast plan does not make the sharp distinction between existing properties and subsequent investments made after the adoption of the new policy. Nor would it really provide for a fixed rate base. It would take the year 1917 as the point of separation, and would treat land differently from other physical property.

As to physical property other than land, the Prendergast plan would take the 1917 properties at their properly adjusted book cost, and then would increase the amount through price indexes to bring them to the present level of prices or construction costs. This part of the investment, moreover, would be adjusted biennially on the basis of index numbers. So far as investments made since 1917 are concerned, the plan would take the book cost reasonably adjusted, with the assumption that this would be equivalent to present reproduction cost; all additional investments would be added at cost. A deduction would be made for observed depreciation at the time the new policy is adopted. Afterwards, provisions would be made in operating expenses only for the equalization of annual retirements, and not current depreciation, including obsolescence and other functional causes.

The Prendergast plan would continue the present basis of adjacent land values. This class of property would, therefore, not be brought within a fixed rate base; nor would it be subject to convenient administrative adjustments. Its determination would continue to depend upon appraisal at the time of any rate adjustment.

THE Bauer plan, after the initial valuations, would treat all property in the same way; all would appear in the accounts as definite sums, and would be subject to continuous accounting control. The Prendergast plan would have three general categories:

(1) Land, which would be subject to variation according to adjacent land values, and would involve conflict of interest whenever determined for rate-making purposes;

(2) Physical properties other than land installed prior to 1917, to be adjusted from time to time on the basis of index numbers;

(3) Physical properties other than

land installed after 1917, subject to a fixed accounting basis. Except land, the property would not be subject to initial appraisal.

THE Prendergast plan provides a fixed rate base only as to the third item, which includes, however, all future investments other than land.

As to the second item, it provides for variation, but this could be readily made upon a definite administrative basis. But with respect to land, it would continue the difficulties that exist under the present "fair value" standard.

To the extent, moreover, that there is variation in the first and second items, there is financial instability because of the normal financial structure of the companies. Whenever a considerable proportion of the capital has been provided through fixed-return securities, any variation in the rate base—whether determined by price indexes or appraisal—produces a disproportionate effect upon the common stock interests, and thus creates financial instability for the company.

BOTH plans, however, have the same general objective of more definiteness and stability of rate base than is attainable under the present "fair value" standard. Both are subject to the same legal attack on constitutional grounds. Among most of the lawyers who considered the subject, there was doubt whether a fixed rate base subject to accounting control could be established through legislative mandate, whatever care might be exercised to treat all interested groups fairly. The view is that a company is entitled, as of any time, to the "fair value" of the properties, determined under then existing conditions. If conditions change, then, in so far as the changes affect the "fair value," the amount must be redetermined accordingly. If there is an increase, the company is entitled to the larger amount, and any limitation to keep to a lower figure would be confiscation. Conversely, if the amount decreases, the public is entitled to the lower sum.

This view presents a sharp clash between the common legal conception, and the view of most economists.

The lawyers, because of their training and experience, look upon public utility properties just as upon other properties that are subject to legal valuation. They see the "value" of any property as dependent upon the circumstances at the time of valuation; they conceive that, as conditions change, the "value" varies, and that, therefore, no amount can be established as a fixed quantity for any legal purpose. According to this view, there is, of course, no possibility to establish a fixed rate base through legislative action upon any grounds of public policy—even if rate control collapses and public ownership follows!

ECONOMISTS, however, look upon the matter from an altogether different standpoint. They distinguish sharply between the *value* of ordinary industrial properties and "fair value" for rate-making purposes as applied to industries which are subject to a special public interest. So far as ordinary industries are concerned, the ultimate *value* of any

The Prendergast Plan May Be thus Summarized—

(1) *Land valuations would be subject to variation according to adjacent land values;*

(2) *Physical properties other than land installed* PRIOR *to 1917, would be adjusted from time to time on the basis of index numbers;*

(3) *Physical properties other than land installed* AFTER *1917, would be subject to a fixed accounting basis. Except land, the property would not be subject to initial appraisal.*

property is dependent upon earning power. This is fundamental and indisputable by anybody, — lawyer, economist, banker, or business man. Whatever the actual cost of any such property may be, or whatever the reproduction cost, or whatever the physical and functional depreciation of the various constituent units, the real value of the property is determined by the earning power, which, in turn, depends upon volume of business, prices obtained for the product, and costs of operation. If the realized and expected profits are large, the value is great; if the profits are small, the value is low,—notwithstanding any actual cost, reproduction cost, or computed depreciation due to physical or functional causes.[8]

IN considering the value of an ordinary industrial property, the clear fact is that the property is really *private* in every basic sense. The management is free to charge what it pleases for the product, or what it is able to obtain in a competitive market. It is not subject to price control in the public interest. The property has no legal limitation upon its earning power. It is free legally to earn what it can; hence its *value* at any time is the discounted or capitalized sum of its earning power.

A public utility is different in this fundamental respect; it is endowed with a recognized public interest, and is, therefore, subject to rate control and limited earning power. It cannot fix such rates as it pleases; it can charge only reasonable rates, and the limit is the obtaining of a fair return on the "fair value." Obviously, therefore, this is not determinable in the same way as the *value* of a private property, but must be fixed with reference to factors exterior to rates and earning power; it must serve as the measure of the legal and limited earning power. "Fair value" must be determined before rates can be fixed, —and before the real *value,* predicated upon earning power, can emerge.

If this basic fact is clearly en-

[8] The only exception appears when plant or individual units have separate market values for use in other businesses.

visaged, then it must appear that the "fair value" of a utility is not subject to the same inherent changes that occur in *value* of ordinary industrial properties. When the earning power of ordinary industrial properties increases, due to any reason, the value increases; if its earning power diminishes, the value declines. But for a utility, the "fair value" must be determined before rates are fixed and the earning power ascertained; hence is not affected by any changes in price level, reproduction cost, or other factors, unless on grounds of justice or other reasons of public policy the amount is increased antecedent to higher rates and greater earning power. The factors, therefore, that enter into "fair value" must be such objective considerations, as fundamental fairness to investors, reasonable regard for the public, and effective administrative standards, but not the condition of unlimited earning power which applies to ordinary properties.

If these fundamental considerations are properly regarded, the economists who have given special study to public utility regulation believe that a fixed rate base can be established and legally supported, provided that there is no inherent unfairness to any group when the amounts are fixed.

Assume that an initial valuation has been fixed according to the Bauer plan; that it has been determined with due consideration to the fact that it is to remain unchanged and that all subsequent investments are added, and that the rate base thus appears as a definite quantity for the objective measure of legal earning power. If then the rates are so fixed as to provide a fair return upon the amount and no more, there can be no change in the value of the properties, whatever the changes in price levels or construction costs.

If the rate base is once fixed according to established legal policy, then the amount is no longer affected by any factors which in other industries may produce increasing or decreasing earning power. The consideration that controls is desirable public policy. This must, of course, include fair treatment of investors, reasonable regard for the public, and, particularly, the requirements of systematic administration to carry out the policy of public control.

Among the more specific constitutional objections made, is the alleged impossibility of binding future legislatures to an established policy when prices have fallen. Assume that the Bauer plan were adopted, and that fifteen years have elapsed, with a decline of 40 per cent in price level. Assume that the initial valuation of a property was $10,000,000, and that additional investments amounted to $15,000,000; a total rate base of $25,000,000.

The claim is that the legislature, upon public agitation, could then abolish the fixed rate base system and go back to the "fair value" standard; and thus allow (say) only $18,000,000 of "fair value" instead of $25,000,000 established rate base.

This change would deprive the investors of the advantages offered by the plan against declining prices. If, therefore, the investors cannot be

safeguarded against lower "values," they cannot be deprived of higher "values" if prices have risen.

THIS contention, undoubtedly, raises a constitutional point. The new policy would, of course, be subject to litigation and judicial determination; no one can predict the outcome. So far, however, as the particular argument is concerned, the legislature probably could not change the plan after fifteen years, when prices had fallen, so far as the rate base at that time is concerned. The investors had put their money into the business for a 15-year period relying upon the guaranties expressly provided by statute. If the statutory terms were then to be rescinded, there would be retroactive legislation and the investors would be subject to unwarranted losses; they would doubtless have constitutional grounds for complaint. They would, indeed, be subjected to confiscation when they are entitled to $25,000,000 under terms fixed by the state, and are then cut down to $18,000,000!

The legislature could, of course, change the system with respect to later investments. But as to that, there would be no motive because the plan would gain for the public the advantage of all low property costs when prices have fallen. To put rate regulation upon a reasonable basis, as a matter of public policy, requires that the public shall bear the actual cost, whether high or low, according to changing conditions. But there is no inherent reason why, when a cost has once been incurred, that thereafter any change should be made because later costs may be higher or lower. To permit such variation not only arouses conflict of interest, but makes the administration of rate making an impossible undertaking, and creates financial instability under the prevailing financial structure of the companies.

BESIDES the legal objections to the fixed rate base, there were also policy objections voiced both by the companies and by so-called public representatives. The companies, naturally, do not wish to be limited to a fixed rate base, especially under present conditions, when extensive rate reductions should probably be made. As a long-run proposition, however, considering times when rate increases may be needed, the investors would probably be served better by a fixed rate base, because of the systematic assurance of the return to which they are entitled.

A valid distinction may be made between the mass of investors and the smaller speculative interests as represented by common stock, and especially of the pyramided holding company systems. The latter groups, most naturally, would resist the close regulation involved in the fixed rate base. The generality of investors, however, as represented by the mass of bond and preferred stockholders, or even the common stock not involved in the holding company arrangements, would doubtless be better served, as a long-run proposition, by a fixed rate base, with its safeguard of the return to which they are entitled. The fixed rate base would largely eliminate speculation from utility financing.

CRITICISM was voiced also by individuals whose concern was

with the consumers, and not with the investors. It was based upon the belief that declining prices are impending—that we are at a point of falling prices similar to the long period of decline that followed the Civil War.

If this view be correct, then the present establishment of a fixed rate base, which would take into consideration the present high price level, would result in permanently capitalizing present high prices for future rate-making purposes. If prices in fifteen years should decline (say) 40 per cent, then, undoubtedly, a lower rate base for a given company might be obtained on the then "fair value" basis, than through the fixed rate base established under present conditions.

The criticism, of course, involves economic prediction as to future price levels. No one today can say with any degree of probability what the future course of prices will be.

In considering public policy, it is necessary to weigh the preponderant probabilities against remote possibilities. The undoubted fact is that regulation is ineffective on a "fair value" standard, and it cannot be made satisfactory without a fixed rate base. The longer the delay in establishing such a system, the longer will be postponed the actual protection of the public and the investors through systematic rate making. If after fifteen years prices have not fallen, then there would be the long floundering, without counterbalancing public benefit. The rational course would seem to be to establish the new policy at the earliest moment, fixing the rate base with consideration of fair dealing all around, with regard for the long-run interest of consumers and investors.

THE problems of rate base and rate making were thoroughly considered by the revision commission from the various angles. What decision may be reached, cannot be stated at the present time. There is a possibility of a division in the commission—not because of any real conflict of view as to what should be done, but because of fear as to the ultimate decision of the courts. The more cautious view is to attempt nothing that will raise serious constitutional questions. Another view is to formulate the new policy with sole regard for what is really desirable in the interest of both investors and the public, and then make every effort to obtain proper decision by the courts when a legal question is raised.

Why assume that the courts will not permit changes which are essential to the proper safeguarding of the various interests and to the effective administration of public rate control?

Unless a definite yardstick for rate making can be established, rate control will remain, to a large extent, futile, and will serve as a strong impetus to the extension of public ownership and operation.

AUTHOR'S POSTSCRIPT

SINCE the above was written, the Revision Commission has made its report to the New York legislature. There was a majority and minority report. The latter adopted the Bauer plan and incorporated it in a proposed bill. The majority agreed that a fixed rate base and return are essential to effective regulation, but instead of the mandatory provisions, it proposed to include the plan in contracts between the state and the companies; it doubted whether a mandatory system could be enforced against a shift to higher or lower prices. The minority believed that the contract plan would not be accepted by the companies on a reasonable basis. While it admitted that there may be a constitutional question as to the mandatory provisions when prices have risen or fallen sharply, it believed the policy would be sustained because of its inherent reasonableness and because of its necessity on administrative and financial grounds.

The Welding of the Wires and the Ether Waves

Some of the economic, financial and political problems that are presented by the project of regulating the telephone, telegraph, and radio utilities by a proposed Super-Commission

By AARON HARDY ULM

"I'LL put a girdle round about the earth in forty minutes," boasted prankish Puck in "A Mid-Summer's Night Dream." That miracle is now performed by radio in less than a second—but the process has precipitated a series of enigmatic questions of public policy. These questions are now being pointed up for review by the United States Congress, which has in prospect a plan for expanding the regulation of the communication utilities, including the telegraph, the telephone, and radio. This project may entail the extension of regulation into such entirely new spheres as patents and international traffic. For the communications services are undergoing some revolutionary transformations as the result of scientific discoveries and patent rights, and are injecting a new aspect into the process of internationalization.

This subject has been studied in all its complexities and potentialities by the Interstate Commerce Committee of the United States Senate. The chairman of the committee is Senator James Couzens of Michigan, that old pioneer of the automobile industry who amassed a fortune out of Ford cars. Senator Couzens is wedded to thoroughness and is immune from trite theorizing. Associated with him on the committee are legislators of all the types that make up Congress — radicals, conservatives, theorists, and hard-boiled practicalists.

Contributing to the study are practically all of the giants of the American communications industries, which is still in an effulging state and consequently still producing Gargantuan personalities of kind that have lent glamor to the pioneering stages of all big American industry. These captains of communications are now playing with the spherical body we call the earth as if it were a toy, wrapping around it wires, cables, radio waves, and other curious *media* by which amazing performances are achieved.

These communications leaders are not fully agreed on questions of public policy; indeed, between them as a group and other groups lie sharp differences of opinion. In fact, the

Senate committee which is handling the subject has been acting somewhat as an arbiter of inter-industrial disputes, the general public commonly taking interest in only the incidental phases of the subject. The big questions relate to equations that are rather beyond the man in the street's ordinary concern—equations that are highly technical and remote from the average man's contacts with most of the communications services.

THE immediate basis of these hearings is a proposal that there be set up a Federal Communications Commission to deal with the communications utilities in much the manner as the Interstate Commerce Commission deals with the railroads and to much less extent with interstate telegraph and telephone operations.

It would take over the work of the Federal Radio Commission, probably in elaborated form. It has been proposed, also, that the new commission exercise regulatory power over the interstate transmission of electrical energy, but it is likely that this plan will be dealt with separately. The hearings show that this power question is big and complex enough to justify a separate handling.

OWEN D. Young, chieftain of the General Electric-Radio Corporation of America interests, gave an excellent summing up of the objective of the communication utilities when he said to Senator Couzens' committee:

> "The best communications at the lowest possible cost—that is our target. . . . We are concerned with communications which require an intervening instrument in order that they may be had by all. It is the use and control of the instruments with which we are primarily concerned. How can we get the best instruments today, how can we get them tomorrow, how can we get them most widely distributed and conveniently located; how can we get them at least cost; how can we get the service of these instruments organized so that it will be the best for the whole people? That is our problem."

The key-word "instrument" brings within Mr. Young's picture the telegraph, telephone, radio, and cable facilities, all of which are linked together by the magic of electricity. The public service performed by these instruments are, broadly, of two kinds only; the transmission of point-to-point or person-to-person communications, and radio broadcasting.

The most ponderous questions of regulation have to do with the first kind of radio communication.

"I visualize the day when there will be a pad on my desk with a special instrument, or else an attachment to my stenographer's typewriter, by which if I wish to send a message I may write it out, connections will be made through a central system like the telephone and there will be reproduced on a pad in your office the facsimile of my message," Mr. Young told the Couzens' committee. "Then I would think that for the first time we had a satisfactory communications service."

The communications art is prepared to render such a service now. But how shall it be instituted? Should it be inaugurated as an adjunct of the telephone system, or of one or both the telegraph systems, or of radio? Or of all three? Or should it be established independently as a new system? Many difficult questions of this

kind are involved in the task of fixing a national communications policy.

MONOPOLY control of all communications facilities would simplify the solutions of these problems, says Mr. Young; but he also states that at present there is no need of combining the domestic telephone and telegraph systems. The telegraph systems, he maintains, should be unified, but he does not regard the need so great as to call for governmental compulsion. He holds, however, that all communications facilities between this country and other nations should be unified at once.

"There, from the standpoint of national interest, monopoly either regulated by the government or owned by the government is a necessity now in international communications," he told the Couzens' committee. "If you have any hesitation about unifying our external communications in the hands of a private company under government control, then I beg of you, in the national interest, to unify them under government ownership in order that America may not be left, in the external communications services, subject to the dictation and control of foreign countries."

The Bell telephone system, approximating a domestic monopoly, is cited by Mr. Young as an example of unitary over plurality control of a communications facility.

"It is no mere chance," he said, "that the American Telephone & Telegraph Company is the largest concern in the United States. . . . When one thinks of the convenience, speed, and vast distances over which communications by voice may be carried on, especially in this country, one must accept it as among the greatest, and perhaps the greatest, human achievement of this age." And the reason for this, he argued, lies in the fact that the company is almost alone in its field, and consequently can deflect energies and funds it otherwise would have to devote to the fighting of competitors, into research work and long-distance planning.

FOREIGN equations add a compelling necessity to the general advantages of monopoly control of communications facilities in this country, Mr. Young argued. There are monopolies of this kind set up abroad, notably in Great Britain, Germany, France, and Italy. The Imperial Cables & Wireless, Ltd., for example, controls all the cable and external radio facilities of the British Empire, excepting those in Canada. No radio communications can get into its territory except through the stations of this monopoly. The Radio Corporation of America has exchange arrangements with it—and with several other similar European monopolies—for the joint handling of radio communications to and from the United States.

"What will happen when our contracts expire?" asks Mr. Young. "These foreign monopolies will trade one American company off against the other and dictate terms to us. We will be able to protect the national interest only by confronting monopolies with monopoly."

WITH Mr. Young stands the Mackay-Behn group, representative of the vast system of communications under the direction of the In-

A Glance Ahead into the Communications Problem:

"I VISUALIZE the day when there will be a pad on my desk with a special instrument, or else an attachment to my stenographer's typewriter, by which if I wish to send a message I may write it out, connections will be made through a central system like the telephone and there will be reproduced on a pad in your office the *facsimile* of my message."

—OWEN D. YOUNG

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ternational Telegraph & Telephone Company, which has the Postal Telegraph lines, the Commercial Cables, the All-American Cables running to South America and the telephone system of Spain, and telephone or radio lines over most of South America,—an expanding system of international communications. Two outstanding spokesmen for this group are Clarence H. Mackay of the Postal Telegraph-Cable system and Colonel Sosthenes Behn, who has been doing, through the International Telegraph & Telephone Company of which he is the head, a truly Napoleonic job in the realm of communications.

These gentlemen have arranged to merge the Radio Corporation of America's communications facilities with those of the International Company when and if the government permits. This merger would constitute a near-monopoly of public service radio communications operations as now carried on from this country; it would also include about two-thirds of present American cable mileage.

The Western Union owns and operates the other American cables; these, together with one to be laid by the American Telephone & Telegraph Company, would be outside of the proposed merger.

In trans-oceanic communication, cables and radio perform substantially identical services. The projected American Telephone & Telegraph cable is of importance in the Europe-United States part of the picture. It was made possible by laboratory research of the kind that is transforming the world's communication structure; it is, in effect a super-cable, with a carrying capacity greater than all the cables now connecting Europe with North America. This super-cable will be primarily for telephone service, but it is expected to yield considerable excess capacity for telegraphing use.

The Young-Mackay-Behn groups

hope that all of these cables will be put into the monopoly which they are endeavoring to found.

But Section 17 of the Radio Act of 1927 stands in the way—even of the International and Radio Corporation merger—for it forbids the combining of cable and wireless lines when the effect would be substantial lessening of competition.

Those who favor monopoly insist that this prohibition should be removed; in return they are willing to submit to the regulation of their monopolistic operations by the government.

How could the government regulate a monopoly whose operations would be in large part across no-man's oceans and in foreign countries—and in great part abroad, on fifty-fifty bases of exchange with foreign companies (as with most radio communications business)?

"I think the world will have to find some way of regulating these rates," said Mr. Young.

But it seemed the opinion of most members of the Couzens' committee that the only way it might be done would be by the cumbersome, and perhaps impossible, medium of treaties.

The suggestion of a national communications policy built around the principle of monopoly awakens but little enthusiasm in the bosoms of those communications leaders outside of the groups which are already prepared to move in the direction of the proposed plan.

"I don't want to interfere with a horse trade between friends," says Newcomb Carlton, president of the Western Union Telegraph Company and temperamentally of the old fighting breed of industrial giants. "Let them go through with it if you want to—but don't ditch the competitive principle.

"In so far as I can prevent it, the Western Union will enter no monopoly set-up," he observed. Then he added, humorously: "There would be nothing for me to do if it did, for I don't know how to run a monopoly and would get no fun out of it if I did."

So far as technical progress is concerned, Mr. Carlton declares that the art of telegraphy has thrived on competition; in proof, he cites the fact that today 90 per cent of the Western Union's traffic moves through the fingers of typists who can be trained in six weeks to send and receive messages. Yet business has so grown that the company still employs about 85 per cent as many telegraphers as it did when the old system of transmission was wholly in use. The capacity of the wires has been so increased that this greater business has called for little addition to the total of wire mileage; yet the plant structures have been practically rebuilt in the last ten years.

Is there a threat of foreign domination of the country's communications interests? "That," retorts Mr. Carlton, "is the biggest bogey-man conjured up in my time. Why, our joint situation in the Pacific causes the Western Union and the Radio Corporation to hold this British monopoly in the palms of our hands. We could play havoc with it any time we wished."

THERE is no objection, so far as he can see, to the plan for letting the wireless and cable lines be merged in competitive fields and be operated under government control, says the soft-spoken and gentle-mannered Walter S. Gifford, president of perhaps the world's most efficient public service corporation, the American Telephone & Telegraph Company. His own concern, admittedly a national monopoly that does business with practically all the people of the country, rather likes being regulated.

"Several years ago the American Telephone & Telegraph Company resolved to confine its operations to telephony or what bears directly thereon," says Mr. Gifford. "And as to earnings, all we seek are enough to enable us to carry on the business efficiently. This attitude is not philanthropic. It is because the company is an investment matter and it would not be fair to the nearly half million persons who own its stock for us to take the risks that attach to the seeking of huge or speculative earnings."

Federal regulation of interstate operations of telephone and telegraph companies, as set up about twenty years ago, has worked very well, indeed, says Mr. Gifford. Everyone concerned—the telephone and telegraph companies, the Interstate Commerce Commission which now has this regulatory power, and the public—have all gotten along together splendidly. So why make a change now, he asks.

And here the giants are pretty well agreed so far as point-to-point communications are concerned. Broadcasting and the allocation of the ether waves are matters which might be left in the hands of agencies like the Federal Radio Commission and the Department of Commerce, where they are at present, they say.

To put all communications regulation in the hands of a new Federal commission which is granted larger powers than are now exercised over them by all other Federal agencies, will lead inevitably to Federal regulation of intrastate as well as interstate operations, as has happened practically in the case of railroad control, observes Mr. Carlton.

While such Federal regulation probably would be best for the American Telephone & Telegraph Company, which alone of the communications companies has had to tackle rate-fixing problems with the state regulatory bodies, the principle is bad, says Mr. Gifford. He and others call attention to the fact that about 98 per cent of the telephone and 75 per cent of the telegraph traffic still is intrastate. (At this point the astonishing information was revealed that during twenty years of Federal regulation the Interstate Commerce Commission has had occasions to investigate only about a dozen complaints against the telegraph and telephone companies.) The Commission's regulatory power is confined mostly to rates, and is substantially the same as in the case of the railroads.

The Interstate Commerce Commission has no jurisdiction over the capital structures of the telephone and telegraph companies; the question of bringing security issues of these and of the radio communication companies under Federal supervision is a big one in the present proceedings.

And this is involved with the question of rate-base valuation, which the Interstate Commerce Commission is now struggling to establish in the wired telegraph-telephone field. Leaders in that group—notably Mr. Young—are inclined to favor the original investment rule over the reproduction cost rule as the test of rate-base valuation. But as the communications plants of the country represent post-war construction in most part, the war-time antics of the dollar are not so involved with valuation proceedings as in the case of the railroads.

PERHAPS the liveliest phases of the present hearings relate to radio—particularly to radio broadcasting. Radio is mixed up with all sections of the communications-by-wire utilities. The Radio Corporation of America is described by its officials as the outgrowth of the necessity of assembling under one control certain key inventions which have made current radio communications possible. Many of the inventions were developed, in greater or lesser degree, as by-products in such industrial laboratories as those of the American Telephone & Telegraph Company, the General Electric Company, and the Westinghouse Electrical & Manufacturing Company. These, with the United Fruit Company, all pooled their patents, and the Radio Corporation of America is the child of this union. Through the Radio Corporation has been sold most of the equipment used in broadcasting as well as in long-distance point-to-point radio communication. The corporation also sells receiving sets, is a parent of the National Broadcasting Company, and owns outright several subsidiaries—even one, (recently set up), for producing new music on a big scale.

LINES of battle in the contest over the proposed new Federal legislation are drawn largely around the Radio Corporation, which is apotheosized by its officials as an establishment set up in response to an appeal sent to them by then President Woodrow Wilson primarily to save to this country's basic radio devices—such as the Alexanderson alternator—and to achieve the technical jointures necessary to maintain efficient domestic radio service.

On the other hand, its opponents, mostly independent manufacturers of radio devices and equipment who are dependent on patent licenses granted by the Radio Corporation, say that the biggest American concern devoted to radio is a trust and should, therefore, be restricted or dissolved entirely.

The independent telephone companies, of which there still are several hundred engaged almost exclusively in local operations, stand, according to their spokesman before the Couzens' committee, with the conciliatory position taken by the American Telephone & Telegraph Company, with which this group of independents seem to get along very well. These independents in the communications field (like the Federal Telegraph Company, for example, which is now engaging chiefly in erecting radio stations, and Press Wireless, Inc., which was created to make use of radio wave-lengths allocated to the

How Can International Communications Utilities Be Regulated?

"How could the government regulate a monopoly whose operations would be in large part across no-man's oceans and in foreign countries—and in great part abroad, on fifty-fifty bases of exchange with foreign companies, (as with most radio communications business)?

"It seemed the opinion of most members of the Couzens' committee that the only way it might be done would be by the cumbersome, and perhaps impossible, medium of treaties."

news services and newspapers of the country), stand substantially with the independent manufacturers of radio devices and equipment.

These are all for the proposed new commission; they would like to have it clothed with broad regulatory powers. They oppose sanctioning of the International-Radio Corporation merger, but whether this opposition is inspired by their objections to the principles involved or by their rather bitter feeling towards the Radio Corporation, is a matter of speculation only.

THE independents declare that the Radio Corporation is arbitrary and oppressive, particularly in the exercise of patent rights which put dominance of the radio industry in that concern's hands. As these rights are rooted in a consolidation of otherwise separated interests, the complainants argue that either Congress or the courts should see to it either that the rights revert to primary holders and thus be competitively distributed or that there be brought about an arrangement for the cross-licensing of patents for all the radio industries, such as has prevailed many years in the automobile industry.

"I think it will be found that they are a body of men seeking to use without right the inventions of others," said Manton Davis, general counsel of the Radio Corporation, in referring to these complainants.

"All that we are asking the government to do is to take this illegal monopoly apart—to put the Radio Corporation in one corner, the General Electric in another, the Westinghouse in a third, and the American Telephone & Telegraph Company in a fourth—so that we, or any independent company or any independent inventor can deal with them singly and not be compelled to deal with them as a trust," retorted Oswald F. Schuette, attorney for the independents.

SUGGESTIONS have been made that Congress modify, in the case of grants covering devices that are essential to the efficient operation of public utilities, the outright monopoly control of letters patent. One pro-

posed modification is that the employment of patents to suppress competition in the public service field be made illegal; another is that the government exercise supervision of the patents policies of public utility companies. These suggestions involved weighty questions of constitutional law as well as of general policy.

Other broad questions relate to the distribution of rights and privileges and the regulation of the rights and privileges to the ether.

WHAT about the zone base of allocating broadcasting privileges? Here is a question that is dear to the hearts of many members of Congress who represent districts and states that are more extensive than populated. Involved in this are regional and local rights, traditionally defined in this country as much by acreage as by distribution of people. It seems that the exigencies of broadcasting are such that the Radio Commission has not been able to adhere strictly to the zone base established by the present law.

What about the vested interest factor of a broadcasting privilege usually not exercisable except by large investment in stationary equipment? The law now recognizes virtually none; broadcasting licenses may be withdrawn or modified every ninety days.

What about the regulation of rates for advertising and publicity services rendered for pay by broadcasting companies? There is none now, and apparently the application of rate-regulation rules to this new and growing utility service involves difficult questions.

Moreover, is broadcasting for pay a public utility service when natural conditions make it virtually impossible for anyone who asks to get service?

This raises another question; to what extent shall the government supervise the allocation of services rendered by broadcasting establishments? It now decrees that political parties, for example, must be allowed equal amounts of time in presenting their cases by radio broadcasting. But what about the churches, the labor organizations, the various organized groups formed to promote assorted theories about all kinds of things? What about the commercial advertisers?

A SOUTHERNER who has his own broadcasting station is accused of "cussing" on the air. Some listeners-in like it and some do not. What shall be done about it?

Here we have a question of censorship. And, curiously, there has been from the general public more expressions as to this "cussing" than as to any one of the huge questions of law and public policy that is involved in Congress' comprehensive review of America's communications system—a system that is now facing the possibilities of a dramatic and amazing transformation!

WANTED—A People's Counsel

IN view of the controversy as to whether or not a State Public Service Commission should exercise a quasi-judicial function, the recommendations for the appointment of "Public Defenders" to represent the ratepayers at Commission and court hearings is significant of present-day conceptions of a Commission's role. In the next issue of this magazine COMMISSIONER FRANCIS T. SINGLETON *of Indiana will tell why he believes such an office is necessary.*

Efforts to Petrify the Rate Base

ON many points the majority and minority members of the New York legislative commission on the revision of the Public Service Commission Law agreed; but on the method of establishing the rate base they split asunder.

They were both in harmony, apparently, as to the disadvantage of a fluctuating rate base and they both apparently agreed that the rate base will continue to fluctuate unless something can be done by legislative action or contract to petrify it.

The minority of the Commission was for forcing the hand of the utilities by playing the legislative suit. The majority was in favor of making game by leading the contract suit.

The trouble with the legislative suit, however, is that it is liable to be trumped.

There are many things legislatures cannot do. If the legislature could establish prudent investment as the rate base it would probably do so for several reasons, one of which is that it would be very popular politically just now.

But we have not made our legislatures supreme. We have deemed it necessary to set up constitutions. The states would never have united to form a central government without the fundamental checks to be found in the Federal Constitution. Perhaps if the beneficial nature of public utility service could have been foreseen a provision might have been inserted in the Constitution depriving those engaged in rendering that service of the privileges accorded other citizens. But this cannot now be done without a constitutional amendment.

It is, therefore, futile to talk about forcing the utilities to waive constitutional privileges by legislative action.

There would, therefore, appear to be more chance of going game by leading the contract suit. This could not be trumped, if the state is not forbidden by its own Constitution from bargaining away its power to regulate.

The minority of the Commission was of the opinion that if contracts were led by the states the utilities would not follow suit and that this would break up the game.

Of course that is a pure guess. All that can be stated for sure is that utilities in the past have entered into contracts respecting rates and service, including contracts for service at cost.

Also they have not as a rule been sticklers for the pound of flesh which advocates of the prudent investment theory seem to think that the law allows.

Henry C. Spurr

False Prophets and Power

A reply to Senator George W. Norris

In the March 6th issue of this magazine the foremost representative of the Liberal wing of the Senate expressed his views on present-day trends in public utility regulation. His article touched upon so many and such highly controversial aspects of regulation that it was inevitable that the author's statements would be challenged. In conformity with its open forum policy, PUBLIC UTILITIES FORTNIGHTLY is publishing the following article—as it published Senator Norris'—in its entirety, as an expression of the viewpoint of a representative of the Public Service Commissions whose efficiency, as a group, Senator Norris assailed.

BY HAROLD E. WEST
CHAIRMAN OF THE PUBLIC SERVICE COMMISSION OF MARYLAND

For there shall arise false Christs and false prophets, and shall shew great signs and wonders; insomuch that, if it were possible, they shall deceive the very elect.
—*From the Gospel according to St. Matthew XXIV–24.*

No one questions the honesty or sincerity of Senator Norris. He is an earnest and conscientious representative of the people of Nebraska, and I, for one, hope they renominate and re-elect him. A man, even though mistaken, who has convictions and the courage to stand up for them, no matter what the effect upon himself personally, or upon his political prospects, is needed in a place where expediency too often seems to be regarded as an acceptable substitute for both convictions and courage.

Therefore, when he paints such a frightful picture of the "power trust" as he painted in the PUBLIC UTILITIES FORTNIGHTLY of March 6th as an argument in support of government ownership and operation of the entire electric power industry of the United States, one must concede that he is sincere, that he actually believes that the monster he has conjured up is real, and that the plan he proposes for its subjugation and control is, to his mind, the only method by which the people may be saved from economic and industrial "slavery."

If what Senator Norris says was based upon facts instead of upon his fears, then many of us might be frightened with him, accept his beliefs, and perhaps his remedy.

On the subject of electric power and power companies, however, the Senator seems to be afflicted with a sort of mental myopia that prevents him from seeing the situation in its proper light and perspective. He has held his devilish picture of the "power trust" so close to his mind's eye for such a long time that it cuts funny capers for him, just as certain geometrical and other designs looked at steadily and for considerable lengths of time appear to move or to change

shape. Yet we all know that this is only an illusion, that the designs have not moved nor changed shape at all.

This distorted condition of the Senator's mental vision has led him to accept as basic, and conclusive, certain facts that are only incidental, and from false premises to draw conclusions and to indulge in prophesies that are false and misleading.

He believes, as his article shows, that most, if not all, of those who are engaged in the production of electric energy by privately owned companies are enemies of the public, and that the State Commissions set up to regulate and control them are but tools in their hands. Or else asleep. To him, no good can come out of *that* Nazareth.

Therefore, as is the case with others of a somewhat similar type of mind, he would disregard the Constitution, particularly as to its guaranties of liberty, freedom of action, and protection of personal and property rights, and take over the gigantic business of supplying the people with electricity, whether the people desire this or not. He ignores, or flatly denies, the rights and desires of the local communities which would be affected.

The end, which seems desirable to him, apparently would justify any means necessary to accomplish it.

ALTHOUGH it is Senator Norris' indictment of state regulatory Commissions that I wish particularly to discuss, his general charges are so bound up with his charges against State Commissions that I shall discuss some of them also, and also indulge in some general observations. In doing this I do not wish to appear either as a defender of, or an apologist for, the power industry or the men who manage and operate the companies which compose it. Moreover, the views I express are my own and no one else can be held responsible or accountable for them.

THERE are evils in the power industry, of course, just as there are evils in all big industries. For Senator Norris' sweeping indictment of the private power industry as a whole, and as a justification for his proposed remedy of government ownership and operation, it appears that he had only the testimony given *against* certain of the power companies before the Federal Trade Commission. That, and his belief that the government-owned power system of Ontario is a wise and beneficient institution, politically pure.

It is true that the testimony before the Trade Commission disclosed instances of colossal and almost unbelievable asininity on the part of some officials of some of the power companies; and perhaps some of downright crookedness. These were shown to be almost as idiotic as the employment by some of the big shipbuilding firms of the country of "Big Bass Drum" Shearer to break up the Geneva Disarmament Conference, the employment of Mr. Hoover's friend Shattuck for $75,000 on the supposition that he could influence Mr. Hoover on the sugar tariff, or the sneaking into the secret sessions of the Senate Finance Committee, by Senator Bingham, of $10,000 a year Charlie Eyanson of the Connecticut Manufacturers Association in the

guise of a government clerk to help frame the tariff bill so as to get fat, juicy, high tariffs on the products of Connecticut factories.

Almost, but not quite.

WHAT are the principal propositions advanced by Senator Norris? They are:

1: That there exists a "power trust," composed of the privately owned power companies, and this trust is controlled by persons who believe they are chosen of God to run the power business of the country.

Now, it has been demonstrated over and over again that there is no such thing in this country as a "power trust," as a trust is generally understood; the Federal Trade Commission itself so declared. There are many power companies, some independent, others controlled by numerous holding companies, but there is no such thing as uniformity of rates, of policy, or of practices; and nothing even approaching joint ownership or common management such as we have in the telephone industry. Yet no one believes the people's liberties are threatened by the substantial control of the telephone industry of the country by the American Telephone & Telegraph Company.

The growth of holding companies in the electric power field may become a menace. The growth may in time lead to the formation of a real power trust if it can be conceived that after the holding companies finish swallowing the separate, independent companies, they swallow one another until only one shall be left, which will be like the "elderly naval man" W. H. Gilbert tells us about, who was:

"At once a cook and a Captain bold,
"And the mate of the Nancy brig,
"And a Bo'sun tight and a midshipmite,
"And the crew of the Captain's gig."

Even that form of corporate cannibalism can be checked and controlled. It ought to be done and it is not at all necessary to sovietize the United States in order to do it.

2: That "not in the history of the world has such an attempt been made by any monopoly to control every avenue of human activity."

3: That "they have been and are engaged, not only in controlling those charged with the administration of government affairs, but in poisoning the minds of children, and leading them into their camp."

4: That they are "determined to control the politics of this Nation from the village to the White House."

The very extravagance of these charges makes any answer unnecessary. They simply are not true.

5: That "the Smithsonian Institution, a government agency, was adroitly employed to give a seemingly official government imprint to a bought and paid for diatribe against the successful government-owned electric system of Canada."

I do not know whether the Smithsonian Institute "diatribe" was bought and paid for or how "adroitly" the Smithsonian Institution imprint was secured, but if the document is the one which I have on my desk, I have yet to see the alleged facts disclosed about the Ontario electrical enterprise successfully controverted, or the direct statements proved to be untrue.

THROUGHOUT the Senator's article he holds up that Ontario publicly owned enterprise, as "a great rock in a weary land," and as a model for this country.

I take it that Senator Norris reads and believes only the public ownership propaganda which extols that enterprise as the one perfect example of what a power enterprise ought to be, and is suspicious of the mental equipment and the moral integrity of anyone who ventures to suggest that there may be an Ethiopian in that woodpile.

"The only critic" (of the Ontario system), he says, "is the occasional American who crosses the border with power money in his pocket to make a prejudiced observation."

Now that is going pretty strong. I think if Senator Norris should make an honest study of the Ontario system on the ground he would find more critics of the system in Canada than he will find in the United States. We, who have even casually looked into the Ontario situation and are without the public ownership bias, are convinced that Sir Adam Beck built up with the Ontario system a great political machine, that the project is economically unsound, that current is sold to domestic consumers at less than cost of production and distribution because they are the people who have the votes, and that industrial users and taxpayers must pay for losses thereby incurred. The people of Ontario just think they get cheap current.

Of course, the domestic rate for current in Toronto is very low, but the real test of whether cost of current is high or low in any community is the *average* price which the utility gets for all its current sold in that community. By this test the Toronto service is higher priced than that of Montreal which is served by a private-owned power company. The average revenue received in 1928 by the Montreal Company was 1.39 cents per kilowatt hour, while the average rate for Toronto was 1.57 cents per kilowatt hour. Also, the Montreal Company paid more than $700,000 in income taxes alone as well as provincial and municipal taxes, which were included in the price paid by consumers, while the Toronto outfit had to pay no income or other taxes.

Ontario is only one province, and a small part of Canada. If the Ontario power system is as splendid as the Senator thinks it is, one wonders why it has not been adopted by other Canadian provinces. Perhaps they know too much about it.

I VENTURE to say that if the Ontario enterprise had to pay taxes on the same basis that privately owned electrical enterprises in Canada have to pay them, keep its books as privately owned companies are required to keep theirs, and provide its own capital for the extension of its lines, instead of only half the cost of those extensions (the other half being paid out of public funds), then the Ontario system would show a big operating deficit.

I also venture the assertion that no utility in this country, electric, railroad, or any other sort, was ever so deeply in politics as the Ontario electrical system has been and is today. However, that's Ontario's business. If it wants things that way it's none of our affair.

The Economic and Political Slavery that Would Result from a Federal Monopoly of Power

"PRIVATELY owned industry has pinched at times, but it has never seriously threatened our liberties. It has been our National Government and our National institutions that have whittled away our liberties, hedged us in with restrictions, and set bureau after bureau over us until our once boasted freedom is fast becoming a 'byword and a hissing.'

"And Senator Norris' plan would carry this process still further. Instead of delivering us from economic slavery to the private power interests, his plan would make up political as well as economic slaves of a Federal Government monopoly whose power over the people would be incalculable."

If Ontario wants it, let Ontario have it and keep it.

PUBLIC ownership and operation and Federal regulation and direction of the power industry are not the remedy for such evils as exist in the industry here. The experience of the government in handling the railroads during the period of government operation and control ought to be sufficient proof of this. Not only did the government fail to make the railroads pay their way, but it turned them back to their owners in such bad order, both as to track and equipment, that the government had to pay the railroads enormous sums of the taxpayers' money to put them back in shape. Since then we have heard no loud clamor for government ownership and operation of the railroads. Before we tried government operation we heard a great deal about its supposed benefits, particularly from a gentleman of Senator Norris' own state. In fact a Presidential campaign was fought and lost largely on that issue.

WHILE I am on this subject let me say that Senator Norris appears to believe that hydro power is of dominant importance. It is important, but not nearly so important as he seems to think. "These power companies . . . are producing electricity from water sites which are owned by the public," he says. Also, "unless we retain our natural resources we will be the economic slaves of the private power industry." Again "every stream that trickles down the mountain side is going to perform (electrical) service for mankind."

Very pretty, but just what do these words mean? They do not mean anything unless the Nation or the states put up the taxpayers' money to develop these streams that "trickle down the mountain side." They will have

to do much more than trickle before private capital will undertake to develop them, for the very simple but sufficient reason that small power plants are not economical.

It costs more to produce a kilowatt hour of current in a small plant than it costs a large plant to produce and transmit it a considerable distance.

As a matter of fact more nonsense has been written and spoken about water power than anything I know of in the public utility field.

In the first place, the cost of building water power plants is very large, and except in plants which are exceptionally favorably located, the interest charges alone on the money it takes to build them frequently makes the kilowatt-hour cost greater than the cost of current produced by steam. Then, unless you have a water power site which develops firm power, such as those at Niagara Falls, there must be a stand-by steam plant operated in conjunction with it in order to secure a steady supply of current. For instance, the great Conowingo development in Maryland and Pennsylvania would have been economically impossible except for the existence of the huge steam plants of the Philadelphia Electric Company which take up the slack during periods of low water in the Susquehanna.

The latest figures I have are for the year 1928. These show that of about 82 billion kilowatt hours of current generated in this country, more than 49 billion were generated by fuel using plants, or about 60 per cent, while about 32½ billion were generated by water power, or about 40 per cent. In that year there were increases of generating capacity in these plants of 1,890,000 kilowatts, of which 1,271,000, or about 67 per cent was in fuel-using equipment and 619,000 kilowatts, or about 33 per cent, in hydraulic. Of these 619,000 kilowatts, 252,000 kilowatts were in one plant, that at Conowingo.

These figures will give a reasonably clear idea of the relative importance of fuel and hydro power, and as further economies are made in the use of fuel for power production, it is likely that the percentage of hydro to fuel will decrease and its use will be largely in connection with fuel using plants and for the carrying of peak loads.

Incidentally, I might suggest that in view of what Senator Norris has said about politics in the power industry, the country has been treated to a classical example of politics in a public ownership proposition in the fight over Boulder Dam, in which Senator Norris himself took a not inconspicuous part.

As a result of that fight the taxpayers of the Nation will pay something like $165,000,000 for the privilege of supplying Southern California with cheap power—that is, cheap for Southern California but expensive for the remainder of the country. There are some provisions in the law for having the money paid back, I know. But I do not believe any baby born this year will live to see the Treasury reimbursed; I'll even make it stronger; I'll say the baby of any baby born this year.

Moreover, I believe that if the credit of the United States were not put behind that project, and if the bonds

to be issued for it were secured only by the property itself, the interest and principal to be paid out of earnings, they never would be sold. That might be a good test for the soundness of public ownership projects generally. Just let them stand on their own feet. Do not put municipal, state, or national credit behind them, or support them with the power of taxation. Let them do their financing on their own ability to make good, even with exemption from such taxation as privately owned companies pay, and see how many would be established.

"UNLESS a stop is put to this giant monopoly" (the alleged power trust), exclaims Senator Norris, "it will be but a few years before it will dominate the entire electrical field that under our civilization and the advances of the art is necessary to the happiness of every individual, for the well-being of every home, and for the maintenance of every manufacturing establishment in the United States." And again: "Unless we retain our natural resources we will be the economic slaves of the electric power industry."

Perhaps so—but I doubt it.

We Americans have allowed so many of our liberties to be filched from us, so many of our rights guaranteed by the Constitution to be sapped and undermined and weakened by interpretations put upon provisions of the Constitution by the courts; and by the Supreme Court itself undertaking to determine economic questions; that there is no telling how much more we will stand. But if we are made slaves of the electrical power industry, it will not be the power industry as it is organized at present, or as it may be organized under private ownership in the next fifty years, but as it would be organized under Senator Norris' plan.

FOR we can, and do, control and regulate the private power industry, in spite of Senator Norris' belief to the contrary; as we have regulated railroads and other necessary privately owned industries. We have brought them to book whenever they have become tiresomely arrogant, and when it was necessary in the public interest. Privately owned industry has pinched us at times, but it has never seriously threatened our liberties. It has been our National Government and National institutions that have whittled away our liberties, hedged us in with restrictions, and set bureau after bureau over us until our once boasted freedom is fast becoming a byword and a hissing.

And Senator Norris' plan would carry this process still further. Instead of delivering us from economic slavery to the private power interests, his plan would make us political as well as economic slaves of a Federal Government monopoly whose power over the people would be incalculable.

JUST what is this plan of Senator Norris and why is it necessary?

The plan is to form a monopoly, "a great combination . . . by the pooling of these natural resources, and by *uniting all available means for the generation and distribution of electric power.*" That "great monopoly, that *all inclusive combination* . . . should be the people of the United States. They should

The Right of Each State to Decide Its Own Regulatory Problems for Itself

"ALL Public Service Commissions do not have the same powers, but the Commission of each state has the powers that the people of that state, speaking through its legislature, wish it to have. And that is the business of each particular state. . . .

"There is no state that I know of that feels it is necessary or even desirable for a sister state or the Federal Government to determine these matters for it."

own and control the sources of power; they should own and operate the systems of distribution," says Senator Norris.

The municipalities would produce and distribute the power to their people under regulation adopted by the states. "When it becomes a statewide venture in which the state *as such* engages, the state should operate under National regulations. The National Government itself will ultimately operate when and where it is most feasible." (Italics mine.) That is the Norris plan.

THAT means, if it means anything, that every municipality in the country would have to go into the electric power business.

Suppose some were so benighted that they did not wish to; that they were satisfied with things as they are? Would Senator Norris compel each municipality to take over the local plant?

This could not be done without buying; the interpretation and construction of the Fourteenth Amendment by the Supreme Court would prevent. The Fourteenth Amendment might, of course, be ignored or evaded as the Fourth has been, and the Supreme Court might be induced to reverse its long line of decisions protecting property. But if the local properties had to be bought, a fair price would have to be paid for them.

MOST of these properties have been valued for rate-making purposes and their value thus established by legally constituted authorities. Incidentally, the value of these properties is in excess of ten billions of dollars, which would mean the selling of quite a lot of bonds if they were to be taken over. Also, the budgets of these companies in 1929 called for the expenditure of $790,400,000, or nearly a billion dollars for construction. And because of the appeal made by President Hoover, they will probably spend more in 1930. If the companies, privately managed, find it necessary to spend approximately a billion a year for construction in order to keep the properties in condition to meet the demands on them, could those same properties, publicly owned, be kept up and extended for less? Or would

that much money be spent at all for construction? If so, would it be provided for out of rates, by the selling of bonds, or by general taxation.

BUT to get back to the recalcitrant city which is satisfied with its local company and does not wish to buy it out.

Take as a concrete case my own city of Baltimore. It seems satisfied. The local power company also owns the local gas system, and the two are operated together. The people like it that way, for they save money. Would they be compelled to take over the electric division and let gas stay as it is? The combined properties are valued at upwards of $100,000,000, of which the electric division is about two-thirds of that value. The city is not prepared to assume an additional bonded indebtedness of $70,000,000 or more. If it refused to do so, could it be compelled or could the state be required to do it? And if the state refused, could it be compelled to do it or would the National Government do it?

Yet the city government or the state government or the Federal Government would have to do it if Senator Norris' plan is to be carried out. And if city or state could be *compelled* to do this thing, where would its liberties be?

NEXT, having formed his "all inclusive combination" by uniting "all available means for the generation and distribution of electric power," the municipalities would distribute it to their citizens "under regulations adopted by the states."

The question that naturally arises here is that if the regulation of private power companies by the state is worthless, as Senator Norris asserts, would regulation by the state of publicly owned power projects be better, and, if so, why? But let that pass. Then when power production and distribution becomes a state-wide venture, in which the state, *as a state*, engages, the state is to submit itself to the Nation.

I am no lawyer, but I am convinced that our state of Maryland would be forbidden by its own Constitution from engaging in the electrical power business or "lending its credit" for such a purpose. Would we be compelled to amend our Constitution to permit it, or would the Federal Government amend it for us? Remember, we are one of the states that framed the Federal Constitution and formed this Federal Union; without our active assistance it perhaps would not have been formed; and the people of Maryland may be somewhat more jealous of their rights in such matters than are the people of Nebraska who are so ably represented by Senator Norris. But let that pass, also.

SUPPOSE our Constitution is amended, or set aside and the "state, as such" engages in the power business; then, (according to Senator Norris' plan), it must operate under national regulations.

In other words, no matter how well it might like its own way of running the power business, however efficient it might be, it must then yield to the Federal Government and operate under Federal regulations. Then, "the National Government itself will *operate when and where* it is most feasible."

If that would not be paternalism run stark, raving mad, I do not know what it would be.

As Mack said of Moran's saxaphone playing, "even if it was good I wouldn't like it," because:

No matter how carefully the Federal law for this plan might be drawn, no matter how plain the language used, no matter how clear the intention of Congress, no matter how definitely the purpose to be accomplished be set forth, and the end to be reached be described, there could be no possible assurance that the law would not be so twisted by interpretation by counsel, or officials, or courts, as to defeat the end which Congress would have in mind in enacting such a law.

A RECENT and striking example of this very thing is given in the action of Secretary of the Interior Wilbur, on interpretation of counsel, in allotting power from the proposed Boulder Dam project to private corporations against the definite purpose of the law and the clear intent of Congress. Whether the law was wise or unwise—(I think it was unwise)—the purpose of Congress was clear. And if such a thing can be done, when the circumstances surrounding the enactment of the law are fresh in everybody's mind, when the men who enacted the law are still in Congress, and know what they intended to do, and *thought* they were doing, what could happen by means of interpretation, to a thing so involved and complicated, with so many and such widespread ramifications, as a law necessary to carry Senator Norris' scheme into operation would have to be?

THE Boulder Dam case is only one of a long line of cases in which interpretation and construction have been used to change articles of the Constitution and laws passed by Congress, until their original intent and purpose have been lost sight of or nullified, and they are used to serve purposes they were never intended to serve.

Perhaps the most notable instance of this sort is in connection with the Fourteenth Amendment. Adopted during reconstruction times for the purpose of preventing the states from depriving the newly emancipated negroes of the south of "life, liberty, or property without due process of law," it was rarely used then, and is now never used for that purpose. Instead it has become the bulwark of the alleged rights of corporations, often perhaps to the detriment of the rights of men. It was construed by the Supreme Court so as to protect the right of property to a return, on the theory that if you deprive it of a return you deprive it of *property*.

Then the court went further under that same amendment designed for the protection of negroes, and has undertaken to determine the purely economic question of what the return on property should be. And in the Baltimore Street Railway Case, just decided, it goes even further.

It seems to undertake, by inference, if not by definite statement, to insure, not a return on value merely, but a return on *capitalization*, thereby validating capitalization. It appears to validate the capital structure of utilities, irrespective of their relation to value, and to set up two standards, not alike, for measuring return.

In so far as the decision does this, it is revolutionary, and goes, I think, further than the Supreme Court has ever before gone in behalf of utility corporations. What is inferential today may become definitive tomorrow. If a right to earn interest on bonds, dividends on stock, and an amount to surplus is to be regarded as property, then logically the next step may be to say what these amounts shall be.

Do I exaggerate? This is what the court declares, and singularly enough its significance has apparently been overlooked by the public, and there has been slight, if any, public reference to it:

> "It is manifest that just compensation for a utility, requiring for efficient public service skillful and prudent management as well as use of the plant, and whose rates are subject to public regulation, is more than current interest on mere investment. Sound business management requires that after paying all expenses of operation, setting aside the necessary sums for depreciation, *payment of interest and reasonable dividends, there should still remain something to be passed to the surplus account;* and a rate of return that does not admit of that being done is not sufficient to assure confidence in the financial soundness of the utility to *maintain its credit* and enable it to raise money necessary for the proper discharge of its public duties.
>
> *"In this view of the matter a return of 6.26 per cent is clearly inadequate."* (Italics mine.)

When the Supreme Court hands down a decision with such a declaration in it, is it any wonder that the utilities are jubilant and hasten to take advantage of it? They would not be composed of human beings if they did not. I expect to have that part of the decision cited to our Commission in our next important rate case. Mind you, I am not grousing. I hope I know how to take my medicine without complaining. But certainly I may be permitted to comment upon the taste of it.

But to get back to Senator Norris' plan with its infinite possibilities for court construction and interpretation, it might be well to ask why it is necessary or even desirable.

Because, according to the Senator, we are in danger of becoming "the economic slaves of the power industry," and because:

1. "The so-called regulation of public utilities by state authorities is in most cases a failure."

2. The power of the utilities is so great . . . that it gradually regulates the regulators.

3. Prices and services are never regulated, so far as it is necessary, in the public interest.

4. Some of the State Commissions are absolutely useless, "either they are slovenly in the performance of duty, have become controlled by the organizations they were designed to control, or *abdicated their power to the National Government during the war's hysterical approach to autocracy and centralization* and have not been moved by sufficient ambition to regain their lost authority." (Italics mine.)

These are the counts in the indictment against state regulation. They are accompanied by no bill of particulars, but even without such a bill they might appear to be serious

if the whole of Senator Norris' argument leading up to these conclusions was not so extravagant and absurd that its extravagance and absurdity must inevitably carry through and contaminate the conclusions themselves. When a man tells you that "never in the history of the world has such an attempt been made to control every avenue of human activity," and that they (the alleged power trust) "are determined to control the politics of this Nation from the village to the White House," which your common sense tells you is not and cannot be so, you are apt to have doubts when he also tells you that the so-called regulation of public utilities is in most cases a failure. These doubts are emphasized when almost in the next breath he makes a statement that is either deliberately misleading or indicates that he does not know what he is talking about. He says "the reports and financial statements of privately owned corporations are made, except in infrequent cases, to their stockholders, while the reports of publicly owned utilities are made to the public, are made publicly, and are always open to easy examination."

I PREFER to think that Senator Norris does not know what he is talking about. The inference is that the Public Service Commissions do not get reports from the privately owned power companies, when as a matter of fact most, if not all, Commissions require the companies to adopt a uniform system of accounts which show the source of every dollar of their revenue and how it is disbursed, and to make, under oath, annual reports and financial statements to the Commissions in far greater detail than they usualy make them to their own stockholders.

Moreover, as soon as these reports are filed they become public documents, open to the inspection of anyone who wishes to examine them. And in most cases, if not all, these reports are carefully scrutinized as soon as they are received and checked against previous reports by the Commission auditors. If there are any discrepancies, or if there is anything that appears suspicious, explanations immediately are demanded.

WHEN Senator Norris charges that Commissions abdicated their power to the National Government during the war, and have not had sufficient ambition to regain their lost authority, he makes a charge that has no more foundation in fact than the other charges and assertions he makes in his article.

The fact is that while the State Commissions did whatever they could to help, and threw no obstacle in the way of the government's plans for carrying on the war, they "abdicated" none of their power. On the contrary, they have always insisted on the right of the states they represent to control the utilities within their borders.

When the Federal Government took control of the railroads, and the telephones and telegraphs, it exercised its powers as a nation at war and did not ask permission of either the states or the companies.

The State Commissions did not abdicate their powers—the Nation seized them.

A Case of "Paternalism Run Stark Mad"

"SUPPOSE *our Constitution is amended, or set aside and the 'state as such' engages in the power business; then (according to Senator Norris' plan) it must operate under national regulations. In other words, no matter how well the state might like its own way of running the power business, however efficient it might be, it must then yield to the Federal Government and operate under Federal regulation.* . . .

"If that would not be paternalism run stark, raving mad, I do not know what it would be."

And when the Transportation Act of 1920 was passed, that act did not have the approval of the Commissions any more than it had the complete approval of the carriers. The carriers were more satisfied with it, perhaps, than were the Commissions because it looked as if it were an effort to restore some sort of order out of the chaos into which the transportation system had been thrown by the government during its period of control and operation. And if Senator Norris will take the trouble to read the *Public Utilities Reports* since that act was passed he will see that the Commissions have been constantly fighting in the courts to protect their authority over the carriers in intrastate matters, with, I must say, slight success. The interstate commerce clause of the Federal Constitution has been stretched to the most fantastic lengths by Federal courts and by Congress to take authority from the states and lodge it in the Federal Government. Some of the lengths to which they have gone are indicated in the able article in PUBLIC UTILITIES FORTNIGHTLY of January 9th, by Mr. John E. Benton, General Solicitor for the National Association of Railroad and Utilities Commissioners on "Why the State Commissions Oppose the Couzens Bill." The Commissions are fighting the Couzens bill now with every resource in their power. It is a wicked and an iniquitous measure except as it applies to radio.

SENATOR Norris' charges against state regulatory Commissions are but expressions of his opinion on a subject with which, apparently, he has slight acquaintance. He gives no facts to support them. I doubt if ever in his life he has been in the office of a State Utilities Commission, and has made even the most casual investigation of how it handles its business, even that of his own state of Nebraska. Unless he actually knows what they are doing, and how they are doing it, he is not a competent witness.

Does he intend his charges against Commissions generally to apply specifically to the Nebraska Commission?

Let him take his own Nebraska Commission and show where it has failed in its duty to Nebraska, where that Commission has been regulated by the corporations it was set up to regulate, where it has failed to regulate prices and services of the utilities as far as is necessary, where it has been slovenly in the performance of its duty, how it is controlled by the organizations it was designed to control, and in what instances it abdicated any of its powers to the National Government.

That ought to be easy if he has anything to go on except his belief and his opinion. That Commission is right at home. Perhaps he does not intend that any of these charges shall apply to the Nebraska Commission. Very well, let him check up on some other. The District of Columbia Commission, for instance. It is right there in Washington. Or the Maryland Commission. It is only 40 miles away. I'll assure Senator Norris we will give him every opportunity to turn us upside down and inside out in his search for evidence to support his charges.

Or he might try the Pennsylvania or the New York Commission. They also will be hospitable.

IT is true that a couple of years ago a utility Commissioner got mixed up in an unsavory mess with a utility magnate. He let the magnate finance or contribute largely to his campaign for election to the United States Senate and he was elected. The Senate threw him out, as was proper. I wonder, though, if he would have been thrown out if his campaign had been financed by the Socialistic Public Ownership League or the League for Industrial Democracy. Anyway, that's the only unsavory incident I ever heard of in which a utility Commissioner was involved, and certainly it does not warrant Senator Norris' attack on the character of Commissioners generally such as he makes when he says they are controlled by the organizations they were designed to control. That is either an attack on their integrity or upon their intelligence.

PERHAPS Senator Norris will say that he judges by results, that if regulation of power utilities by State Commissions had not failed, none of the stupid and perhaps reprehensible things revealed by the testimony before the Federal Trade Commission could have taken place.

That does not follow at all. These utilities, while charged with the public interest, are still privately owned. The State Commissions, while they have the power, and do regulate them as to rates and services, pass upon their security issues in many cases, limit their earnings to a fair return upon the fair value of their property, and stand between the corporations and the people to the end that justice may be done to each, are still not the managers of these corporations. They are not empowered to substitute their judgment in corporate matters for the judgment of a utility's officers and board of directors. The courts have made that very clear.

Nothing the corporations have done, so far as I have been able to learn from reading newspaper reports of the Federal Trade Commission's investigation, has been unlawful or

beyond their legal rights, however questionable some things have been from other points of view. If this were not so, some of them would be under indictment now, or at least, steps would have been taken to indict them for unlawful practices.

ONE of the acts committed by the power corporations which, according to Senator Norris, "shocked the Nation," was the alleged effort directed at "poisoning the minds of children, and leading them into their camp," by means of circulating propaganda in schools and colleges in favor of private, as against public, ownership of utilities.

In that effort they were following the example set by the W. C. T. U. and other prohibition organizations a generation or so ago in having taught in the public schools "the effects of alcohol and tobacco on the human system;" and that of the American Tariff League in having propaganda circulated and taught in whatever school they could "reach," on the blessings and benefits of a high protective tariff. Dr. Arthur L. Faubel, Secretary of the American Tariff League, so testified before the Caraway Lobby Investigating Committee of the Senate late in January of this year, and he justified the spreading of such propaganda because, he said, most teachers and economists believed in free trade, low tariffs, or tariffs for revenue only. And it was to counteract these heretical economic beliefs of professors and instructors that the Tariff League invaded such schools as they could with high tariff propaganda.

Yet the Nation does not seem to have been shocked by that disclosure, nor have I heard Senator Norris shriek about poisoning the minds of children on the tariff. I suppose the power companies, the W. C. T. U., and the Tariff League had the *legal* right to spread their propaganda wherever and however they could. I am not justifying it. I think it is absolutely wrong. But it does seem that every interest which has an axe to grind tries to get the schools and the school children to turn the grindstone. Any individual or group which does this is just as much subject to blame and criticism as any other. The schools should be cleansed of all this verminous propaganda, whether in support of utilities, public ownership, alleged "reforms," political theories, high or low tariffs, or anything else. When it is undertaken a punishment ought to be devised that will fit the crime. It seems to me this could be done, adequately and properly, without fastening the iniquity of public ownership on the patient people of this land.

THE second count in Senator Norris' indictment of State Utility Commissions, that "the power of the utilities is so great that it gradually regulates the regulators," and part of the fourth count, that some of the Commissions "have become controlled by the organizations they were designed to control," would be serious if there was one single circumstance aside from the senatorial incident I have mentioned, or one single fact to substantiate it. In his entire article there is nothing that is more reckless, more wild, more utterly untrue.

Senator Norris has the reputation of being a fair and an honorable man. Yet he attacks the honor, the honesty, and the integrity of the great body of Railroad and Utility Commissioners of this country, who in season and out, in face of courts and court decisions that tie their hands, and in the face of a public frequently unfriendly if not actually hostile because the Commissions decline to confiscate the property of the utilities, are serving and protecting the public in every way possible under the law.

And Senator Norris does this thing without giving a single fact, or citing a single authority to support his charges.

If the cause of public ownership of utilities requires such methods to put it across, then it is in a sad and a sorry situation.

"PRICES and services are never regulated so far as it is necessary in the public interest," is the third count in the indictment. Let us see:

In the first place, no Commission, unless in exceptional circumstances, allows a utility to earn more than 8 per cent on the fair value of its property. In cases where Commissions have endeavored to reduce rates to a point where they would yield substantially less than that, the courts have interfered.

Case after case has gone from Commissions to courts on the issue of rates alone. Perhaps nothing short of the actual confiscation of the property of the utilities would suit Senator Norris, but Commissions cannot do that. Nor could Senator Norris, under any scheme he could devise, unless he could get the Supreme Court to reverse itself in almost every utility case it has had from Smythe *versus* Ames, to date, repeal or amend the Fourteenth Amendment to the Constitution, or abolish the Supreme Court altogether.

Too much space would be required to attempt even to list the work that State Utility Commissions do in the interest of the public, including the regulation of rates and service. The list is a long one. But specifically let us consider the regulation of rates in the interest of the public.

As I am more familiar with what the Maryland Commission has done and is doing, in this respect, I shall mention it first. Maryland is a small state, and I assume that what Maryland has done has been done on a larger scale by Commissions in larger states, with more and larger utility corporations.

Beginning with a rate reduction July 1, 1923, affecting the largest corporation under its jurisdiction and continuing to December 31, 1929, the Maryland Commission has made reductions in rates for gas and electricity of approximately $15,000,000, of which about $10,000,000 were in rates for electricity and $5,000,000 were for gas. In that time there were four reductions in the electric rates of the one large company just mentioned and two in the rates for gas. Our latest reduction in rates of this company, made last summer, saves $1,300,000 a year to its customers.

Reports from other Commissions indicate similar activity in the interest of the public. In California, reductions in rates for 1927–28 were

between $3,500,000 and $4,000,000. In the last five years, they have amounted to about $6,500,000.

In Georgia reductions for the last two years are reported to amount to between $1,500,000 and $2,000,000 a year.

Reductions in the last five years in Indiana are reported to have been more than $6,000,000.

Michigan reports savings to consumers of electricity in the last five years of more than $14,500,000 and to consumers of gas of about $1,200,000.

More than $2,000,000 a year has been saved to customers of power companies in Missouri.

Commission regulation in New Jersey resulted in a saving in 1929 of more than $8,000,000.

The New York Commission, as a result of negotiations with the power companies under its jurisdiction, has secured reductions in the last five years of $17,500,000.

Chairman Ainey of the Pennsylvania Commission states that consumers of electricity in his state are saving approximately $25,000,000 a year over rates that were in effect in 1914, when regulation of utilities went into effect in that state, and that this period of reduction in rates and extension of service has been coincident with the investment of $640,000,000 in power plant and distribution systems in that state.

In North Dakota, the savings to consumers of power and gas in the last five years, as a result of rate reductions, have amounted to $4,500,000, according to C. W. McDonnell, Chairman of the Board of Railroad Commissioners. Of this sum $4,400,000 was in the rates for power.

Consumers in Utah are saving $1,000,000 a year, as a result of rate reductions by the Public Utilities Commission.

Savings in Wyoming amount to about $250,000. The Nevada Commission is saving its people about $1,000,000 a year in rates, which includes rates for water. Chairman Claypool of the Arizona Commission stated some months ago that in 1925 rate reductions amounting to $15,600,000 were put into effect in his state, and that reductions of about $300,000 have been made since then.

In Oklahoma, reductions in gas rates of $3,170,000 and in electric rates of $560,000 have been made in the last five years; for the same period, Virginia has cut electric rates approximately $1,000,000, and gas rates $150,000, while in Oregon there has been a cut in electric rates of $250,000, and one of $61,765 in gas rates.

THESE are only a few instances, and they by no means cover the country. But they do give a fairly

"PUBLIC *ownership and operation and Federal regulation and direction of the power industry are not the remedy for such evils as may exist in the industry. The experience of the government in handling the railroads during the period of government operation and control ought to be sufficient proof of this.*"

good indication of what utility Commissions are doing to regulate prices and services in the public interest. While most of the reductions in rates were ordered as results of investigations, or by negotiation with the utilities, it is true some reductions were made voluntarily by the utilities themselves. However, I am convinced that if it had not been for the existence of Commissions in the various states, these voluntary reductions would have been very few and far between. Standpatters are to be found in utilities as well as in Congress.

I DOUBT if any Federal system of regulation that could be devised could show results nearly as good in savings to consumers alone as those shown by the State Commissions. Even if Federal regulation could show greater savings, that would not justify the government in interfering with the right of the states to attend to their own affairs.

Certainly, if the facts show no need for Federal regulation of power rates and services, still less do they show any necessity for forcing Senator Norris' scheme for public ownership and operation of the power companies upon the municipalities and the states. Senator Norris' opinion that the power companies are enemies of the public welfare and his belief, reached apparently without any investigation of the facts of the situation, that Public Service Commissions have fallen down on their job are certainly not sufficient justification for attempting to force upon this country such an inefficient, wasteful, and oppressive system.

BUT even if the State Commissions should be inefficient—which I do not concede for a moment—I might remind Senator Norris that that is the business and the concern of the states themselves, not of the Federal Government.

All Public Service Commissions do not have the same powers, but the Commission of each state has the powers that the people of that state, speaking through its legislature, wish it to have. And that is the business of each particular state.

Some Commissions are perhaps more efficient than others, and that is the business of the people who elect or the governors who appoint. The people have the remedy in their own hands, and can use it at will.

Where regulation is not as effective as it might be, it can be made effective. It can be just as effective as the people want it to be. And how effective they want it to be, within the limits of the Federal Constitution and the decisions of the courts, is something for them to determine for themselves. There is no state that I know of that feels it is necessary or even desirable for a sister state or the Federal Government to determine these matters for it. Certainly Maryland does not.

Moreover, so far as I know, nothing has been revealed to indicate that Senator Norris and his fellow believers in public ownership are "God's chosen" to determine the future of the power industry in America. As for me, I am somewhat weary of all self-appointed Messiahs who insist on saving us from ourselves. I like them not.

I view them with alarm.

As Seen from the Side-lines

UNITED States Senator Hugo Black of Alabama went on the air a few nights ago and delivered himself of what the newspapers described as "a slashing attack on the power trust."

* *

SUCH ominous terms as "monopoly" and "propaganda" and such accusatory phrases as "extortionate profits" and "unconscionable rates" fell from his lips in an unending stream.

* *

SENATOR Norris of Nebraska arose in his place in the Senate and uttered a similar attack in his best form.

* *

THERE was, as usual, no reply to the indictments which they flung.

* *

THE Senate Committee on Interstate Commerce, of which Senator Couzens of Michigan is the chairman, devoted the better part of two weeks to an inquiry of influence alleged to have been exerted by those utilities upon the Federal Power Commission.

* *

THE Senate Lobby Committee, of which Senator Caraway of Arkansas is the directing genius, devoted its talents to delving into the alleged attempts to persuade the Congress, by covert means, to lease Muscle Shoals to the American Cyanamid Company and a group of power companies.

* *

MEANWHILE, the Federal Trade Commission, after two years of probing into the public relations of the power corporations, began an inquiry of their financial structures which may go on for another pair of years.

* *

NOT since the trust-busting days of Colonel Theodore Roosevelt has any single industry been afflicted by attacks from so many angles at the same time.

* *

ALL the attacks, accusations, allegations, innuendos, and direct charges, thus far unanswered, have fallen upon a very fertile field. Congress scratches its head pensively and asks itself, "Can all this be true?"

* *

UNLESS specific, contradictory evidence is presented, Congress will believe it is true. In that event, the utilities will be in for a period of what they no doubt will regard as persecution. Lambasting the power companies will continue to be the joyful sport of the Congress, notably of the Senate.

* *

AN accountant of the Federal Power Commission told one of the committees that he was ordered to "lay off" the power companies and that the alleged effort to dissuade him from what appeared to him to be his duty was seemingly engineered by one of the representatives of the power organizations.

* *

REPRESENTATIVES of farm organizations admitted that they were receiving financial contributions from power companies while permitting prominent officials of the Nation, including a President of the United States, to believe that their attitude on Muscle Shoals was directed solely by their interest in agriculture.

* *

A WASHINGTON publicist, who had accepted some of that money, was conferring with members of the Senate in the assumed role of a disinterested observer.

* *

TALES were told of failure to inquire deeply into the investment costs of power companies which have received public water-power sites, and of influencing members of the Cabinet to withhold such inquiries as were made and which allegedly demonstrated swollen accounts.

WHETHER those charges are accurate or inaccurate, whether they are the results of fair or of biased brains, whether the popularity of assailing the power companies has reached a vogue which tempts unjust philippics, is not the point of these observations. The point is that the cause of the power companies has fallen to such a low estate in Congress that the companies possibly will be made to suffer legislation which can embarrass or severely injure them. The pendulum has swung to the widest extreme against them. Passion runs against them where once they were enthroned in the congressional good will.

* *

I TALKED recently with one of the men who has had a hand in waging this entire campaign against the utilities. He said to me: "Some of these recent 'disclosures' have been manifestly unjust. I believe they have been accurate enough; that there was sufficient basis for them, at least. But I do not believe the power companies knew what some of their agents have been doing in Washington. I believe they have been misrepresented by some persons who were more concerned in getting money for themselves than in adequately and intelligently representing the cause of the companies."

* *

THIS man reminded me that the so-called "power trust" has already and thus far lost its contests on Muscle Shoals, Boulder Dam, and on the investigation itself. He believes that what he terms "a straightforward, ethical presentation of the companies' rights on the high plane of public policy" is absolutely necessary if they are to revive the loss of caste which has been caused them.

* *

IT would seem that one of the results of all these attacks will be the ultimate passage of an act creating a new Federal Power Commission, composed of civilians and outfitted with ample funds to make their financial inquiries for recapture purposes.

* *

PRESIDENT Hoover has given such a proposal his backing. We are told that the Secretaries of War, Interior, and Agriculture are only too ready to relinquish that work; their prior concern being in the success of their immediate and important departments. Such a commission would doubtless be invested with authority to regulate interstate power rates. The three secretaries have looked upon the commission which they constitute as a sort of stepchild, possessing a nuisance value to them rather than an important blood relationship.

* *

NEW commissions are usually bustling and officious. They go at their work with zest, with the desire of inculcating their value in the public mind. Possibly a new one would join spiritedly in the hullabaloo that has been going on for two years.

John T. Lambert

THE *Smithsonian Institution has figured that if all our machinery operated by power should be taken away, it would require the services of thirty times as many hardworking slaves as we have population to duplicate the work done in America. In other words, the use of power and machinery gives to every man, woman, and child in our country the equivalent of thirty slaves, or the average family of five has one hundred and fifty slaves working for it.*

What Others Think

Is the Present System of Regulation a Challenge to Self-Government?

A STATEMENT presented in the testimony before the New York Commission on revision of Public Service Commission law by Donald R. Richberg, of Chicago, General Counsel for the National Conference on Valuation of Railroads, has been issued in pamphlet form. In this is set forth in legal phraseology all of the major conclusions of the critics of public service regulation and public utility operation under private management. Mr. Richberg says that after a few decades of experimentation we now face the fact, "generally conceded by impartial students" that present regulatory methods are inadequate to protect the public interest.

On the assumption that almost everything with respect to regulation and the courts is wrong. Mr. Richberg suggests a practical program of relief which can be developed along the following lines:

"I. All public service corporations authorized to do business in the state should be organized under laws providing that the proprietary capital (which may be nominal) shall be furnished by, or donated to, the state.

"II. The appropriate regulatory commission should be authorized to name a minority (possibly one-third) of the directors, who might well be chosen from nominees offered by economic organizations of users of service, such as merchants' and manufacturers' associations, chambers of commerce, labor unions, tenants and consumers leagues, etc.

"III. The majority of the directors should be chosen by cumulative voting of those contributing capital for a fixed compensation, probably represented by bonds, debentures, and notes of varying securities and corresponding rates of return. In cases of default there would be provision for either a reorganization under the same law or, in case of necessary abandonment of the public franchise and sale of the properties, there would be fixed priorities in the satisfaction of obligations. If a combination of public and private investment were required, or any public guarantee of obligations, the public direct control of the management would be correspondingly increased. Increased security to private investors would thus be complemented by decreased private control.

"IV. In order to induce existing public service companies to reorganize under the law, it might be provided: (1) that no authority to extend an existing public service and no further public grants of any character should be yielded thereafter, except to a corporation organized under the new law and voluntarily submitting to its requirements; (2) that no direct competition would be authorized by one public stock corporation with another; but (3) that public stock corporations could and would be authorized to compete with private stock corporations or to supplement or extend the service furnished by such private corporations; or (4) that public stock corporations could be authorized to condemn the physical properties of existing private stock corporations; or (5) in the event of persistent opposition by unreconstructed and essential public utilities a constitutional amendment could make the operation of a public utility service by a private stock corporation unlawful on and after a fixed date. The effect of such an amendment upon private property rights would be less harmful than the effect of the prohibition amendment; its enforcement would be attended with much less difficulty; and the community benefit would be at least equally certain.

"V. Every public service enterprise organized under the law should be required to transact all of its authorized public business through the one corporation and required not to engage in any other business.

"VI. All the directors and managing officials of a public stock corporation should be designated as public agents; but the majority directors, who would be selected by private investors, and the managing officials of the corporation, should be subject only to the general regulations or specific orders issued by the regulatory commission after public hearings. Such regulations and orders would be reviewable by the

courts as at present in order to determine their conformity with statutory or constitutional requirements and limitations. The minority directors would be special agents of the regulatory commission having access to all corporate records and furnishing information to the commission at any time upon the corporate operations and transaction of business. They would be subject to removal by the commission for acts or omissions in violation of law, or the orders of the commission, or for failure to do anything clearly required to protect the public interest, or because of other evidence of incapacity for public responsibility.

"VII. All expenses of regulation should be apportioned and accounted for as operating costs of the regulated enterprises. Thus consumers would pay for their own protection, which would be an improvement on the present practice of compelling them to pay for their own exploitations.

"THE foregoing suggestions have been presented, not as a finished program, not even as inflexible items in such a program, but as concrete indications that it is possible to eliminate anti-public control of public utilities and to establish effective public control. I could not stultify myself by advocating only a patchwork improvement of the present system of regulation, well knowing that ultimately a radical reorganization must be undertaken. It would be unworthy of the serious character of this investigation to evade the conclusions of a long and searching analysis of the nature, source, and growth of an intolerable private power to control public business and to manipulate government itself—in the face of notorious and far-reaching abuses of such power that have brought about the present and many similar inquiries.

"But, as an active participant in public affairs, I am also aware that public opinion gathers momentum slowly and that rapid progress must wait upon accumulation of public demand for adequate reform. So I have sought to offer first the objectives of a permanent program; and at the same time I desire to point out that definite progress can be made in the right direction by minor changes in existing law which may be regarded as preliminary steps in a long time and comprehensive advance toward ultimate adequate control of public business.

"1. So long as private property interests exist in public utilities, in necessary conflict with public interests, there should be at least a clear separation of public business from private business. The public agents selected to manage a public business should not be permitted to act also as private agents to enrich security holders, nor permitted to spend public revenues for such private purposes. If security holders desire to oppose regulatory measures, to influence politics, or otherwise to protect or promote private property rights, they should be required to employ private agents and to pay their expenses out of their private purses. The managers of a public business should be solely public trustees. The revenues of public business should be public funds, having no private character until paid over to private security holders as compensation for private investment in a public enterprise. (The doctrine of the Dayton-Goose Creek Case (1923) (263 U. S. 456, 68 L. ed. 388, 44 Sup. Ct. Rep. 169, 33 A.L.R. 472) should be extended. The doctrine of the Southwestern Bell Case (1923) (262 U. S. 276, 67 L. ed. 981, P.U.R.1923C, 193, 43 Sup. Ct. Rep. 544, 31 A.L.R. 807) and the New York Telephone Case (1926) (271 U. S. 23, 70 L. ed. 808, P.U.R.1926C, 740, 46 Sup. Ct. Rep. 363) should be abrogated.) The expenses of regulation, but none of the expenses of defeating regulation, should be paid out of the operating revenues of public utilities.

"1a. No public utility corporation should be permitted to engage in any other business except furnishing public service.

"2. Public regulation can be made effective, economical, and prompt only when adequate and detailed knowledge of the handling of public business is possessed at all times by the regulatory officials. This requires continuous participation in management by public agents who are unembarrassed by private obligations or interests. Such public directors or supervisors should be appointed for each public service company, as representatives of the regulatory commission. They should have no managerial authority except to insist on compliance with public regulations. Their intimate knowledge should make possible the settlement of minor complaints without formal hearings. On larger issues they should be enabled to report the facts as promptly and accurately as an operating official could report to his board of directors. At present the intimate public contact essential to protect the multitudinous interests of consumers is conspicuously lacking; and the cost of accumulating adequate evidence upon large issues is commonly prohibitive.

"3. Officers, directors, or operating officials of public utilities should be forbidden to use any secret means for controlling or influencing public officials or public opinion in the matter of public regulation; and the wilful, persistent violation of this prohibition should disqualify the violator from holding any such position in the future. This would permit candid and honorable efforts to improve to protect a

public service but would stigmatize private objects and secret methods as breaches of public trust.

"The main purpose of the foregoing suggestions is to point out that the ownership and operation of a public business should be made legally a public trust. Until the legal obligations of a trusteeship are established and enforced, the conflicting demands of acknowledged legal obligations to investors and moral obligations to consumers will continue to swell the current output of hypocrisy, evasion, and corruption that makes public utility operations today such an unpleasant and menacing spectacle."

MR. Richberg's general conclusion is presented in these words:

"The gains of four hundred years development of the natural resources of America, the gains of one hundred and fifty years development of the institutions of self-government, the gains of the industrial revolution and the development of machine power for the service of human beings, may be made available to enrich the lives of one hundred and twenty million people and to endow their children with an even greater wealth, only if we can exercise the essential powers of self-government and control the public business of the nation for the common good. We have ample evidence that if the public services of transportation, communication, light, heat, power, and water remain subject to proprietary control for private profit, the great masses of the people will steadily lose control of their government and steadily lose control of their standards of daily living. Their habits of living and thinking, their freedom to work for themselves and to think for themselves will tend to disappear in individual subjection to the all-powerful influence of great enterprises, which on the producing side will measure their incomes and on the consuming side will determine their expenditures.

"There is no exaggeration in the warning of one of our most eminent and conservative economists, written in 1911:

> "'It is not too much to say that the future of democracy will depend on its success in dealing with the problems of public ownership and regulation.'[1]

"There is no exaggeration in asserting that the problem presented to this Commission is nothing less than the recovery of our vanishing power of self-government. It cannot be solved by any timid fumbling and tinkering with a regulatory machinery of proved incompetence. It may be solved by a vigorous reassertion of the necessity for public control of public business and a courageous exercise of the supreme authority of the state to protect the general welfare and to preserve the institutions of free government."

IF by "self-government" Mr. Richberg means the exercise of governmental functions and that these functions are vanishing, the evidence would appear to be against him. We believe it was Senator Borah who asserted in substance that we are not threatened with too little government but with too much and that if we do not watch out we shall find ourselves under the tyranny of a bureaucracy unparalleled in the history of governments.

A foreigner, unfamiliar with the facts, on reading Mr. Richberg's statement would probably conclude that we are in a very bad way in this country; yet we live in what is without doubt the richest country in the world. Mr. Richberg says that privately owned public utilities today collect in excess of $10,000,000,000 from the American people.

But he does not think it worth while to mention what the American people get for those dollars. Take the electric industry for example. Here is a statement by the National Electric Light Association; you can discount that as biased if you wish, but having done so, ask yourself whether it is not true:

"Push a button and our home is illuminated as by the midday sun; an electric vacuum cleaner banishes dirt and dust; an electric washing machine and electric iron help with the housework; a fan gives cooling breezes or an electric heater radiates warmth; an electric range cooks the family meal; an electric refrigerator makes ice; or the many other familiar labor-saving appliances are placed in action.

"Today, electricity rings the door bell; tows a ship through the Panama Canal; lifts a great bridge; milks the cows; chops feed on the farm; increases production in factories by providing good lighting and ample power; lights homes and stores; even provides illumination for surgical operations in hospitals. It is ready to perform these tasks twenty-four hours of each day.

"Yet it was only a short time ago—less than fifty years—that the richest kings had none of these conveniences which make life

[1] Taussig, *Principles of Economics*, page 411.

easier and better for even the poorest Americans at the present time.

"This change is due to the tremendous efforts of the Nation's electric utilities."

It might be added that this great development has been made under regulation, a fact which might conceivably be construed as some evidence, at least, that regulation has not stood in the way of progress and that it has not done any very material and certainly no irrevocable harm to the public.

—DAVID LAY

CRITICAL ISSUES IN PUBLIC UTILITY REGULATION. A pamphlet by Donald R. Richberg of Chicago. 1930.

Should the Commissions Regulate Rates or Profits?

PROFESSOR Philip Cabot's theories as to public utility rate regulation, as expressed in the *Harvard Business Review,* April and July, 1929, are unsound, in the opinion of Dr. John A. Ryan, of the Catholic University, Washington, D. C., in an elaborate discussion in the January, 1930, issue of the same publication.

According to Professor Cabot, public utilities are in the main not of a monopolistic character and he thinks that even to the extent that they enjoy monopoly privileges they can best be regulated on the assumption that they are subject to indirect competition; that the Commissions, therefore, should aim to regulate prices rather than profits.

Dr. Ryan takes issue with both of these assertions. He maintains that Professor Cabot's theories are both unsound and impractical. On the subject of regulation, Dr. Ryan says, for instance:

"Regulation of rates has two phases, the process itself and the conditions within which it is restricted as regards the rate base and the fair return. The regulating Commissions should possess all the legal authorization, all the funds and all the personnel that are necessary to insure the following: the use of proper accounting systems by the companies; the rendering of adequate reports and the disclosure of complete information concerning company receipts, expenditures, operations, and plans; the enforcement of managerial efficiency; and rigid control of security issues. In all probability, there is not one State Commission which is equipped according to all these specifications. Several of them are wanting in the majority of the Commissions. One defect is particularly conspicuous in relation to electric utilities. Inasmuch as the State Commissions have little or no control over the management fees exacted by holding companies from the operating companies, they are unable to exercise full control over operating expenses. The profits of the holding companies from engineering, construction, and finance enter into the fixed capital accounts of the operating companies. Since the State Commissions can not pass authoritative judgment on the reasonableness of these charges, they lack adequate control over the issuing of securities. Apparently, the interstate character of the holding companies renders them immune to state control in their relations with the operating companies. . . .

"The companies engaged in the interstate transmission of electric current are likewise beyond the jurisdiction of the State Commissions. Both kinds of organization should be brought under Federal control through some such agency as that proposed in the bill introduced a few months ago by Senator Couzens."

DR. Ryan believes that what he refers to as the second phase of regulation is highly unsatisfactory. This is the requirement that the Commissions base the return on the fair value of the property. He believes that much could be done by legislation to clarify this situation; but he concludes:

"Possibly the increased cost of effective regulation, according to the specifications of the foregoing paragraphs, would provoke a widespread demand for public ownership and operation. That would not be an undesirable outcome. Regardless of the efficiency or inefficiency of regulation, public ownership of public utilities ought to be adopted by the cities and the states wherever conditions are favorable and public opinion is sufficiently educated. Finally, the Federal Government ought to establish

a sufficient degree of public operation in connection with such projects as Muscle Shoals and Boulder Dam to act as a check upon private operation and to set up standards of what is fair and attainable in both service and price."

PUBLIC UTILITY RATE REGULATION. By John A. Ryan. *Harvard Business Review.* January, 1930.

The Falling Cost of Utility Service *vs.* the Rising Cost of Government

IN a statement before the Commission on the Revision of the Public Service Commission Law of New York, Matthew S. Sloan, president of the New York Edison Company and affiliated companies of the Consolidated Gas System declared that notwithstanding that practically every item of cost entering into the construction and operation of public utilities has greatly increased, electric rates have tended downward. Electric service, he says, is one of the few items entering into the family budget that can be said to be substantially lower than before the war.

He gave the State Commissions full credit for their part in bringing this about. He declared that on the whole he could not escape the conclusion that the State Commissions had been a potent factor in bringing about these rate reductions much more promptly than they would otherwise have taken place.

Mr. Sloan's statement in response to questions covered many phases of electrical operation and regulation problems, including interconnections, holding companies, inflation or overcapitalization, valuation, return, changes in rate forms, submetering, and legislation. He is in sympathy, he said, with all efforts to improve the Public Service Commission Law.

On the subject of state regulation of utility companies, he said:

"We in America have believed in private ownership, the institution of private property, and the benefits of energetic private management, but always under rigorous public control where the public interest affects the business. When you plan to keep state regulation effective and study how to improve the means of doing so, you are doing something to conserve what I believe to be an important and essential American institution. Only if state regulation cannot and does not succeed, will there arise the need for considering other methods of public control.

"We in America have always believed that we can accomplish a substantial measure of justice and public protection through our laws and our various departments of government, executive, legislative, and judicial. In their field, the Public Service Commissions seem to me just as important, necessary, and deserving of public support, as are the courts. We find need from time to time to improve our judicial system and strengthen our criminal laws, but we do not on that account say that our courts and our laws have failed. The same thing seems to me to be true about tribunals like the Interstate Commerce Commission and the State Public Service Commissions.

"The important thing, after all, is that the greatest possible number of our people shall have the best possible service, at rates kept reasonable, and that the vast volume of private capital which furnishes this public service shall be secured safe investment in so doing. Electricity and gas affect profoundly the American standard of living, the productivity and earnings of labor, the comfort and cheerfulness of our homes, the convenience of the discharge of our daily tasks.

"It has been a great thing for America, I am sure everyone agrees, that these utility industries have been able to make such a wonderful contribution to American life and prosperity. *I know that state regulation by Commission has been a very important factor in bringing that about.* State regulation by commission has stabilized our securities as investments, has created widespread confidence in the integrity of our accounts and the good faith of our operations, and has exerted a constant and often undue pressure in behalf of costly extensions of plant and facilities and in behalf of drastic reductions in rates even before reductions are warranted.

"Without the presence of some supervening institution like the Public Service Commissions, the utility industries of the country could hardly have obtained the necessary capital to make the enormous

expenditures the public demand for service has compelled. The Commissions often insist that we reduce our rates first and then go ahead afterwards to bring about the economies to make such reductions possible, but I suppose that is a part of the price we pay for an orderly system of public regulation and safeguard, state-wide in scope and founded on the idea of fair and reasoned treatment alike for the utilities, their customers, and their investors."

PUBLIC utility companies are sometimes charged with furthering a private rather than a public interest. Upon this point Mr. Sloan said:

"I am just as much interested as you are, or as any commission could be, in the conducting of the affairs of these companies *along lines compatible with the public interest* and giving to the public the best possible service at rates neither too high nor too low. I always try to keep the public interest chiefly in mind, and I am perfectly willing to have any State Commission keep tabs on me and check up on me, to see that I do not overlook anything that could be done to improve conditions."

IN the course of his statements, Mr. Sloan sounded a warning against the increasing cost of government. He said:

"State and local taxes have advanced steadily ever since 1913, with no indication of becoming stabilized. Expressed in per capita terms, the state and local tax burden has more than trebled since 1913.

"Out of every dollar of gross revenues which these system companies receive from their customers, 11.46 cents goes to the various branches of government as taxes, thereby decreasing our annual net revenues by the sum of $17,254,501.51.

"To the extent of $17,254,501.51 a year, therefore, we act as *tax collectors for the government without profit to ourselves,* and our rates have to be that much higher than would otherwise be necessary.

"Our *rates* are lower than in 1914. Our *taxes* alone are $14,941,526.19 *higher* than in 1914.

"I wish to express to you my personal belief that the extraordinary increase in the cost of government, taxation, and public indebtedness, which far exceeds the rate of increase in public wealth, constitutes the outstanding present problem of the American people. It seems to me to far outweigh any of the questions of state regulation you have been discussing, important as those undoubtedly are.

"Nevertheless, the demand from some people for enlargement and extension of governmental activities and regulations goes on. Not far ahead may be found the limit of the capacity of some industries to pay taxes at all, and their reaction to still higher taxes may have serious effects on production and employment in the commonwealths and communities responsible for this piling up of tax burdens and public debt.

"Nevertheless, with this upward trend in all of these items making up the cost of supplying electric utility service, residential rates have constantly been reduced and the tendency is still downward. I shall not be satisfied until we can accomplish substantial further reductions for actual, regular use of electricity, in homes and small business places as well as in industry."

This is a matter which sooner or later will have to be seriously considered.

STATEMENT OF MATTHEW S. SLOAN BEFORE THE COMMISSION ON REVISION OF THE PUBLIC SERVICE COMMISSION LAW. January 15, 1930.

The Fading Distinctions between Public and Private Ownership

"WE continue to talk of public ownership and private ownership. That old distinction grows ever thinner. A water power company selling water to a town and owned by the twenty-five thousand people constituting that town, is called a publicly owned business. An electric light company selling power to the same town and owned by twenty-five or fifty thousand stockholders is called a private business. Both of these are publicly owned. Most of our large business is now publicly owned. We may distinguish between public ownership through the corporate community and public ownership through the large corporation, but the activities of these enterprises are as much the concern of the public as the activities of our civil administrative bodies. Their affairs are public affairs and can no longer be regarded as private affairs in the old sense."

—JOHN T. FYNN

The March of Events

Federal Power Bill

SENATOR Couzens, on February 12th, introduced in the Senate, legislation to extend powers of Federal regulation to interstate transmission and to include holding and management companies. This bill provides for a power commission of five members with jurisdiction over rates and service of companies engaged in the production of power transmitted in interstate commerce for sale to distributors.

The bill contains provisions for valuation which follow closely the provisions of the Interstate Commerce Act but provide for the examination of books and records not only of the persons made subject to the act but of all affiliated persons, such affiliated persons being members of groups of corporations headed by a common parent company.

Provision is made for references to joint boards to be composed of one representative from each state in which the power involved is produced or consumed. These joint boards are given full power to investigate rate matters, and decisions of such boards would become final unless exceptions are filed within thirty days after their determination. In such case the Commission takes appellate jurisdiction.

The issuance of securities would be regulated and this would include not only operating companies but holding or parent companies. The provisions in this particular are similar to those contained in the Interstate Commerce Act. The *United States Daily* comments as follows:

"Senator Couzens emphasized the fact that there is no attempt by this bill to interfere with state control of intrastate transmission, distribution or sale of power, it being the intention that the state authorities shall have full power of regulation in cases in which they have jurisdiction. There has been intentionally omitted from the provisions of this bill any such provision as that contained in § 13 of the Interstate Commerce Act which permits the Federal Commission to prescribe rates within a state in order to prevent discrimination against interstate commerce. The purpose of maintaining state control so far as possible is then further emphasized by the provisions for the establishment of joint boards."

California

Secret Subscriber List Not Open to Federal Officers

A DECISION by Federal Judge Frank H. Kerrigan upholds the right of a telephone company to refuse access to its secret subscriber list as a basis for raids on so-called "telephone bootleggers." The San Francisco *Chronicle* says in regard to the decision:

"The decision voids the sensational pre-Christmas drive of prohibition authorities on bootlegger telephones, and calls into question the 'ingenuity and skill' of prohibition investigators employing such methods.

"Prohibition agents in December put in telephone calls for liquor deliveries, then summoned E. T. O'Donnell, office manager of the telephone company, by subpoena issued by Federal Commissioner Arthur G. Fisk. But O'Donnell, accompanied by Attorney Alfred Sutro, appeared at a joint hearing of Fisk and Commissioner Ernest E. Williams, and refused to answer questions, finally walking from the hearing.

"Sutro contended that Commissioners were without the power to issue subpoenas in a case which was not pending before them, but that they would answer a 'proper subpoena' where criminal action had already been brought against a defendant.

"Judge Kerrigan literally upheld Sutro's contention that the government process was in fact an aid in application for a search warrant in which the government, not having sufficient probable cause for an arrest, sought to make up the deficiency.

"Kerrigan further held that a search warrant at the present time has a status inquisitorial, that the Federal Grand Jury is the sole government inquisitorial body and that a Commissioner or even a Federal court may not legally invade its province."

Georgia

Watered Stock Issue a Man of Straw

THE watered stock bugaboo was recently sprung upon the members of the Municipal Utilities Rate Association at a meeting at Macon. William M. Lester, chairman of the association, according to newspaper reports, in referring to what he termed "abuses," mentioned basing rates on watered stock. This brought forth a sharp retort from James A. Perry, chairman of the Commission, who said:

"The libelous statement carried in the press of yesterday and today emanating from the so-called Municipal Utilities Rate Association has been going on for something like a year. Regret exceedingly the necessity of dignifying the nonsense characterizing these meetings, but for myself, whether the result of ignorance or willful misrepresentations, I shall no longer allow such false statements to go unchallenged. The association referred to is sailing under the guise of protecting the public from unreasonable utility rates, due to the alleged failure of the Georgia Public Service Commission to do its duty. It is claimed that rates are prescribed for returns on watered stock.

"This Commission has never at any time considered capitalization in any manner, stock or bonds, in fixing rates. We have never given consideration to anything but the actual 'bare bones' physical value of the property under consideration. In doing this we have prescribed rates just as low as we felt could be defended in the courts if attacked. Indeed, in some instances, they have been attacked in the courts and set aside.

"The recent revision of the gas rates in Augusta does reduce the company's revenue slightly in excess of $40,000. Yet, we have the ridiculous statement that there has been no reduction in this company's revenue. The same nonsense has been applied in a reference to the recent revision of gas rates in Atlanta for natural gas. The truth is in Atlanta, taking into consideration the increased heating value of natural gas as compared to artificial gas, and the reduction in the rates as applied to the last twelve months' business, available at the time of the revision, you have a reduction in revenue in Atlanta of approximately $800,000 per year.

"I do not know whether the Municipal Rate Association is a back-firing of the old Municipal Ownership League, or whether it was conceived with the thought of providing jobs for two or three individuals."

Indiana

Associations Oppose Merger

SEVERAL Indianapolis clubs and associations, according to the newspapers, have sent to Governor Harry G. Leslie and the members of the Public Service Commission resolutions opposing a proposal for merging $70,000,000 of interurban power, gas, water, heat, light, bus, railway, and ice properties which has been before the Commission.

Objectors to the merger contend that the plan is contrary to the Indiana utility law which, it is said, prevents the consolidation of dissimilar, unconnected, and widely scattered utilities. The further point is made that a consolidation of this sort would make it impossible for a small town or city to defend, much less prosecute, a rate case, because of the great expense in making appraisals and employing accountants.

Indianapolis Wins Point in Gas Plant Suit

THE city of Indianapolis, on February 26th, won the first round in its fight to secure the gas plant of the Citizens Gas Company when Federal Judge Robert C. Baltzell overruled a motion of attorneys for Newton I. Todd to strike out substantially all the city and company answers to the original complaint. Mr. Todd represents a group of holders of stock certificates who seek to block the city's acquisition of the utility in accordance with the original franchise granted in 1905.

The suit is based on the contention that the 1905 agreement was invalidated when the utility surrendered the franchise for an indeterminate permit under the Public Service Commission. Judge Baltzell said that there can be no doubt that the contract in question was valid at the time of its execution, and he cited authorities to show that the voluntary surrender of the franchise at the time an indeterminate permit was taken out did not relieve the utility from the agreement which it has made with the city.

Trial of the suit has been set tentatively for May 1st. It is the belief that the recent ruling on the motion practically decides the main issues of the suit.

A battle was started on March 12th in county court to force a receivership.

Kansas

Company Asks Court to Prevent Commission Probe

THE Wichita Gas Company has filed suit in the Shawnee County District Court to enjoin the Public Service Commission from enforcing an order which it entered on December 10th calling for a new investigation of rates, practices, and charges of the public utility in Wichita. The investigation is said to be the result of offers on the witness stand by officials of the Wichison Gas Company, during a recent hearing, to sell gas to the Wichita Gas Company at the gates of the city for 25 cents per thousand feet.

The public utility company asked an injunction on the ground that the proceedings instituted by the Commission were not brought in good faith "but solely for the purpose of harassing the plaintiff, occasioning it and its officers and employees vexation, loss of time, and expense."

It was further contended that the order was instituted "for the purpose of compelling plaintiff, by continuous vexation and trespass on its time, money, and tranquillity, to consent to rates heretofore established by said Commission and which have been repeatedly adjudicated to be unjust, unfair, unreasonable, and confiscatory." The company's attorneys contended that every possible issue involving the utility's rates and practices had been raised in proceedings now pending in the United States District Court for Kansas.

Kentucky

Appeal to Court Based on Commission Record

THE Lexington gas rate case which has been appealed from a ruling of the Commission to the Federal court, says the Lexington *Leader*, will be submitted to that tribunal on the record of testimony made before the Commission, thus saving much time and cost to the city and the utility company in presenting witnesses and taking new testimony. At a preliminary hearing held recently in Lexington, jurisdiction of the case was taken by the Federal court where it will be decided by Judges Hinkenlooper, Dawson, and Moorman, who will sit as a three-judge statutory court.

It is predicted that the case will be in the hands of the Federal judges for final adjudication by July 1st at the latest. In the meantime, briefs covering the voluminous testimony will be submitted. More than $500,000 of impounded money paid by gas consumers of Lexington is still in the hands of Circuit Clerk John H. Carter, trustee of the fund, awaiting disposition when the case is finally decided by the Federal tribunal.

Maryland

Franchise Expirations May Impair Bond Values

AT a recent hearing before the Commission in its investigation of a proposed merger sought by the Empire Public Service Corporation, the stability of the bonds which the corporation proposes to issue to finance the measure was questioned by Charles W. Smith, chief auditor of the Commission. He told the Commission that a recent survey of the fourteen Maryland electric utilities which would be merged revealed that county and municipal franchises under which the power companies operate will, in several instances, expire before the date of maturity of the bonds. The Baltimore *Evening Sun* says:

"The possibility of the county commissioners and municipal authorities refusing to renew the franchise will, with the exception of a certain salvagable value, wipe out the properties pledged as collateral for the bonds, reducing the value of the securities which the Commission is asked to approve, the auditor declared.

"Mr. Smith also asserted that his survey of the properties had failed to reveal anything like the values which engineers of the power corporation placed on the utilities in the application which is now being heard."

Massachusetts

Report of Special Commission

A SPECIAL legislative commission, appointed to investigate the conduct and control of public utilities in the state, reported to the general court on March 3rd. Proposed legislation to carry out the opinions of the commission is embodied in ten bills which the commission recommends to improve conditions in the industry. A minority report was filed by Representative Lee M. Birmingham of Boston. His report was accompanied by six bills for new legislation.

The commission does not recommend direct regulation of holding companies but would give the Department of Public Utilities extensive powers in the investigation of relations between holding companies and operating companies. Criticism is made of the practice of long term management, engineering, and purchasing contracts between related companies. The commission believes "that a method of doing business in which the ultimate decisions both as to what contracts shall be made and what their terms shall be rest with the same man is, unless checked, certain to lead to undesirable results." The commission would give the Department of Public Utilities power to terminate such contracts where the prices charged are found to be excessive.

The long established Massachusetts method of regulation, in the opinion of the commission, should be continued if possible. On this score it is said:

"This method fixed the rate base upon which a fair return is allowed largely on the actual cash investment. It finds this doctrine imperilled by recent decisions of the Supreme Court of the United States, notably the O'Fallon Case, which require important consideration to be given to the reproduction cost of the property in determining the rate base. The commission suggests that a case coming from such a background as exists in Massachusetts where both the community and the companies have acquiesced in the present method of regulation for many years might conceivably lead to a result different from the line of decisions giving dominant weight to reproduction cost."

Municipalities dissatisfied with private operation would be permitted, under a simplified procedure, to acquire public utility plants at fair compensation. A bill recommended by the commission would place entirely in the hands of the Department of Public Utilities the decision as to what property shall be taken by the municipality and what price shall be paid for it. The only limitation on the Department's discretion is that the company shall not be allowed less than the actual amount invested.

Although the Commission sees danger in the increase of foreign control, it sees no way, however, "in which the holding of shares in either operating companies or holding companies by persons resident outside of Massachusetts can be effectively prevented without so impairing the value of such shares as an investment as to run the risk of seriously diminishing the flow of capital to the industry."

The minority report advocates direct regulation of holding companies; restrictions on mergers; memorializing of Congress to require resort to the state courts before going into Federal courts; legislation to preserve investment cost as the basis of rates; and greater facility in establishing municipal plants.

Both the majority and minority members condemn ownership of newspapers by gas and electric interests, but the majority does not consider any legislation on the subject necessary. The minority member believes that there is still a relationship between the papers and the utility companies.

Missouri

Installment Purchase of Light Plant Upheld

A MUNICIPALITY can follow the present fashion of buying on the installment plan when it wants to acquire public utility equipment, according to a decision by the Missouri Supreme Court. This ruling sustained a contract by which the Fayette municipal plant purchased additional equipment on credit without regard to the constitutional limit on the city's debt.

The city of Fayette, through an ordinance passed in 1928, contracted with Fairbanks, Morse & Company to purchase two engines and other equipment for its electric plant for $60,200 to be paid in equal monthly installments over a period of six years. There was a provision that the city was to pay from plant income all expenses of efficient and economical operation of the plant. Payments for the equipment were to be paid only from the amount saved in the cost of producing electricity compared with the former equipment. The contract provided that the pur-

chase price should not create any general obligation of the city; that no property taxes should be levied to pay it; and that no part of the price should be paid from any city funds other than the specified income of the plant. In event of default the company could take back the machinery, in which it retained title until the purchase price was paid in full.

Judge J. T. White, who wrote the opinion, ruled that the contract did not establish a debt within the meaning of the constitutional provision, since the constitutional limitation on the debt of a municipality contemplates a debt which must be paid by resort to taxation. The provision for payment out of income would obviate this.

New Hampshire

Tax Program May Halt Rate Reductions

ALLEN Hollis, legislative counsel for the Concord Electric Company, the Exeter & Hampton Electric Company, and the Grafton Power Company, appearing in opposition to a proposed tax on franchises of electric and gas utilities included in an interim commission's program of tax equalization, expressed the belief that local companies would undoubtedly absorb the tax without rate increases, but that imposition of the tax would result in interruption of the systematic reduction of rates which has been going on since 1922.

Mr. Hollis told the committee that rates had been reduced in Concord an average of 30 per cent since 1922; that operating costs had been decreased in proportion to the rate decreases; and that an increase in business was in turn responsible for the reductions in operating costs. The Concord *Monitor* says:

"He said the simple question before the special session was whether money is to be taken from one group of people in order to lighten the burden on another group of people. This question was purely one for legislative jurisdiction, he said. He drew a distinction in discussing the utility franchise bill between the Concord and Exeter companies, which he described as local operating companies and the Grafton Power Company, which he described as a wholesaling company.

"Hollis denied that utilities feared investigation but drew a fine distinction in asserting that they feared not the result but the consequences of investigation. He stated it to be his belief that there is not a utility in the state which is today receiving the income to which it would be entitled under the United States Supreme Court ruling that companies are entitled to an 8 per cent return upon a valuation of reproduction value less depreciation.

"A rate controversy resulting in establishment of such a base for rate-making purposes, he said he believed, would result in rate increases."

New Jersey

State Aid to Get Rid of Grade Crossings

ELIMINATION of railroad grade crossings under some comprehensive plan by which the state will bear a part of the cost, says the Newark *News*, was advocated on March 4th by more than a score of speakers at a hearing on two bills dealing with the subject. No opposition was expressed to the principle of the state contributing, although there were some differences of opinion with respect to financing. The *News* states:

"William R. Brown of the Bergen County Board of Freeholders, expressed belief that the $2,000,000 a year provided for in the Davis plan would be insufficient. Following somewhat the recommendations offered by Senator Pierson last week, Mr. Brown suggested a bond issue of $100,000,000 to eliminate the present mill and half mill taxes for institutions and highways. His thought was that $3,000,000 a year should be taken from the gasoline tax and devoted toward amortization of the proposed bond issue.

"Automobile interests generally, as represented at the hearing, were not favorable to diverting any part of the gasoline taxes to other uses than the building of roads. They, too, favored the general plan of a bond issue.

"Edmund W. Wakelee, appearing for Public Service, urged an amendment to the Davis bill to carry out last year's policy under which it was stipulated that public utilities corporations should share for their own structures in the crossing elimination plans. Under the Davis bill, where street railways

are involved, it would be provided that they should pay 10 per cent toward the cost of elimination.

"This proportion, Mr. Wakelee thought, inequitable. He said the Public Service would be willing to meet its share of what the state would contribute to crossing eliminations, but did not think it should be charged with paying part of the railroads' share. In support of this view, Mr. Wakelee said the need for crossing eliminations has not been brought about by street railways, operation of which has decreased 40 per cent since 1911.

"During the same period, he added, the operation of automobiles has shown an increase of 2,000 per cent. In other words, he added, it is the automobile rather than the street car that has brought about the present situation."

New York

Buffalo Fare Case Goes to Federal Court

A REQUEST by the International Railway Company, which operates in Buffalo, Niagara Falls, and other communities in that vicinity, for a hearing before a statutory court of three judges was granted by Judge John R. Hazel in Federal district court on February 26th. Hearings are to be held April 16th. Associated with Judge Hazel will be Judge Simon L. Adler and Judge Martin P. Manton.

The company alleges that unless its fare is increased to 10 cents in Buffalo, with corresponding increases on other parts of its system, its property will be confiscated. The New York Public Service Commission had previously refused approval of higher fares. Opposition to the removal of the case to Federal court was based largely upon the ground that the company should first exhaust its remedy with the Commission by applying for a modification of the present fare.

The company claims a valuation of $60,290,130 for the Buffalo lines and $90,000,000 for its entire system. Representatives of the Commission and of the cities opposing the fare increase criticise the Mitten Management plan under which payments are made for outside services. The contention is also advanced that excessive depreciation charges have been made and that the estimates of value have been grossly inflated.

More Expense to Ratepayers under Governor's Plan

IRWIN Kurtz, a former special deputy attorney general in the telephone rate proceeding, has made the statement that Governor Franklin Roosevelt "was provoking a deluge of court proceedings and increasing the expense to the ratepayers and had not suggested a single sound, constructive, forward looking plan for public utility regulation." He said:

"The Governor's position on the function of rate-making bodies is hopelessly inconsistent. He first deplores, as I do, the rush into the courts, especially the Federal courts, of public utility corporations with these highly technical rate cases. Then he declares that the Public Service Commission is 'neither *quasi*-judicial nor any other kind of judicial' but is the representative of the legislature, and, back of the legislature, the people. He thus gives notice to the public service companies that they can no longer expect to receive open-minded and impartial consideration of their claims. Will the application of such a theory lessen the likelihood of rate cases being taken before the courts? It will not. Rather it will blaze a path directly into the courts, where alone a controversy would receive a calm judgment on its merits."

Tenant Opposes Submetering Practices

SUBMETERING of electric current in apartment buildings has been attacked in Bronx supreme court by Leon London, attorney, who is a tenant in a Bronx apartment building. He obtained a temporary court order on March 8th compelling the Economy Electric Company, owner of the building in which he lives, and the New York Edison Company to restore service to his apartment. Service had been denied by the submetering company because of his refusal to pay a $10 deposit required by the company of its customers.

The submetering practice has been opposed before by electric utilities but now it seems that the tenants want to take a hand in the matter. A representative of the New York Edison Company is quoted as saying that the electric company has no choice in the matter of selling current to these concerns under present regulation. In several instances in which there have been complaints about submetering, however, it has been shown that customers are charged the top rate of the utility, though by using a large quantity of

current through one meter the submetering concern is able to command a lower rate. The difference between this quantity rate and the retail rate is the submeter man's profit.

The usual deposit required by the electric utility is $5 on which it is required to pay 6 per cent interest, but the submetering concerns, it is said, are under no such obligation. As a matter of practice the electric utility demands a deposit only from an applicant who is unknown to the company officials or unable to give satisfactory references.

Assistant District Attorney Martin Frank, whose attention was called to a possible violation of law by the submetering concerns, is quoted in the Bronx *Home News* as follows:

"Apparently the submetering concerns are performing public utility functions without having franchises or coming under the control of the Public Service Commission. The law on the subject is not very clear and I am not yet prepared to give an official opinion about it. But the complaints in hand are being carefully investigated and if action from this office seems necessary, it will be taken."

Ohio

Higher Street Car Fares Demanded in Columbus

PRESIDENT Ben W. Marr, of the Columbus Railway, Power & Light Company, early in March announced that the company would increase fares on April 5th to 8 cents cash, with 5 tickets for 35 cents. This precipitated a discussion by members of the council as to what action should be taken. It seems to be the opinion that opposition will be made.

The company has been operating under a "gentlemen's agreement" with respect to car fares and electric rates since its franchise expired four years ago. Two methods of opposition have been suggested: first, to order the cars off the streets; and second, to institute injunction proceedings against the company.

One phase of the situation is the joint operation of street railways and the electric plant. Opponents of the higher fare have asserted that if fares are increased electric rates should be decreased; that the company voluntarily joined the two branches of public utility operation and that the return on the entire enterprise is adequate.

Mr. Marr, in announcing the proposal to raise fares, stated that the company would make expenditures of $500,000 for new cars and $500,000 for new tracks. An increase of 10 per cent for street railway employees was also proposed.

The Chamber of Commerce, according to the Columbus *State Journal*, has approved the higher fares with the statement:

"It is well known that the number of passengers carried on street cars is dropping off each year, with a result the company has for a number of years shown an increasing loss in that department of its business.

"The rate of street car fare in Columbus is the lowest in the United States, with the exception of two or three equally low fares. Street railways cannot profitably operate on 5-cent fares.

"Public utilities in our city that furnish good service under fair, upright business methods should be accorded help and proper assistance in order that their credit and the credit of our city should not be impaired."

Oregon

Appliance Dealers Object to Utility Sales Methods

THE Oregon Merchants Utility Bureau has asked the Commission to require public utility companies to segregate the accounts of merchandising or jobbing business from accounts pertaining to their business of manufacturing and distributing heat and electricity. This is said to be the first step in an effort to prohibit utility companies from charging merchandising sales expenses to operating expenses which go into and form a part of the structure upon which service rates are based.

The merchants contend that the Oregon laws require the Commission to compel utilities to render separate accounts for utility and nonutility business. They make the further contention that merchandising and jobbing supplies of utilities escape local taxation and, therefore, merchants and jobbers are not equally taxed.

W. M. Hamilton, district manager for the Portland Electric Power Company in the Willamette valley, says the Salem *Capital Journal*, defends the practice of his company

in charging appliance sales cost to operating expenses as being a proper expenditure in stimulating the consumption of power, thereby lessening the per unit cost of service to the public and preventing increases in rates which, he says, could not otherwise have been avoided in the face of rising costs entering into production and distribution of electricity.

Pennsylvania

Waste Is Charged in Rapid Transit Report

DR. Milo R. Maltbie, utilities' consultant, in a special report on expenditures by the Philadelphia Rapid Transit Company, according to the Philadelphia *Evening Public Ledger*, charges gross extravagance during the five years ending June 30, 1928. The report was made to City Controller Hadley on March 4th.

During the past year, it is reported, the Philadelphia Rapid Transit Company spent $6,018,618, including the Mitten Management fee of 4 per cent. Dr. Maltbie asserts that it is emphatically evident that the services of Mitten Management have not enabled the P. R. T. to dispense with a full and well-paid staff of general officers. He questions the wisdom or economy in paying such a management fee if the company is also to maintain a complete staff of officers and a growing payroll.

Scranton Electric Rates to Be Probed

THE Public Service Commission on March 12th instituted an investigation upon its own motion into the rates of the Scranton Electric Company. Coincident with this action, the Commission announced that it was conducting a thorough examination of all electric rates throughout the state.

The Commission contends that the Scranton Company's rates are unfair, unjustified, unreasonable, and unjustly discriminatory. It is further averred that these rates yield an unreasonable and excessive return upon the fair value of the property. The company is given twenty days in which to file an answer.

The Scranton Electric company distributes current in Scranton and a large number of other communities in that part of the state. The present rates were put into effect on August 1, 1928.

The Latest Utility Rulings

CALIFORNIA COMMISSION: *Re Falconer.* Application of a motor carrier for authority to transport passengers for three months was granted subject to certain conditions. The Commission stated that it was adverse to granting a certificate for a limited period of time to aid in a development plan which may or may not turn out successfully where such certificate might be used as a means of inducing investment through claims that permanent and adequate transportation is available.

CALIFORNIA COMMISSION: *Re Automobile Ferry Company.* An automobile ferry company was authorized to operate between San Diego and Coronado notwithstanding existing service. The Commission held that the protection of a utility which has allowed its service to run down until competition knocks at the door is not conducive to good service and to the public interest. It was said to be incumbent upon every utility to keep abreast with public needs regardless of whether there was competition facing it or not. Two Commissioners dissented.

ILLINOIS COMMISSION: *Re Southeastern Illinois Gas Company.* A utility was authorized to construct and operate a gas system furnishing butane, which is a by-product of the manufacture of gas from natural gas. This is the first known general utilization of this product for utility purposes, at least in Illinois.

INDIANA COMMISSION: *Re Chicago, South Shore & South Bend Railroad Company.* Security issues were authorized. Non-par preferred stock was not classed as common stock for purposes of Commission tax on such securities.

INDIANA COMMISSION: *Northern Indiana Telephone Company v. Commercial Telephone Company.* A toll dispute between two telephone companies was settled by permitting both utilities to allow toll calls over their own facilities or to divide such business between them on the basis of allowing 25 per cent of the tolls to the originating utility.

INDIANA COMMISSION: *Re Northwestern Indiana Telephone Company.* A petition for increased telephone rates in Hobart, Indiana, was modified. The Commission disapproved of the accounting practices of the utility, especially with regard to the treatment of depreciation funds.

INDIANA COMMISSION: *Re Indiana Service Corporation.* A petition of a utility for rate adjustments for electric service was approved with the exception of a coal clause which was eliminated on the ground that the Commission had no power to confer authority for increased rates contingent upon some future happening such as fluctuation of the price of coal. [*Reviewed in this issue.*]

IDAHO COMMISSION: *Re McCall Light & Power Company.* A utility was ordered to improve service; a similar order was given to the Smith Telephone Co. and the Idaho Improvement Co., a water utility.

KENTUCKY COURT OF APPEALS: *Russell v. Kentucky Utilities Company.* A street railway company was permitted by virtue of an agreement with the city of Paducah to amend its original franchise so as to substitute motor busses for street car service.

MAINE COMMISSION: *Public Utilities Commission v. Gould Electric Company* (*Maine Public Service Company.*) The Commission modified the utility's rates so as to produce a calculated return of slightly less than 7 per cent on a valuation finding of $440,000.

MONTANA COMMISSION: *Re Lewiston-Great Falls Motor Transportation.* A certificate of the Pioneer Transportation Company was revoked because of the failure of the motor utility to continue all-year service. The plea that roads were impassable was held to be immaterial.

NEBRASKA COMMISSION: *Re Central West Public Service Company.* The Commission refused to authorize securities of a utility to be used to raise funds on non-utility property, to wit, an ice house. [*Reviewed in this issue.*]

NEW JERSEY COMMISSION: *Re Rockland Electric Company.* The Board decided that it has jurisdiction to grant the application of an electric company for the right to exercise the power of eminent domain and lands for the use of high tension transmission lines incidental to its distribution service.

NEW JERSEY SUPREME COURT: *Weehawken v. Board of Public Utility Commissioners.* Where the Board merely permitted an application for increased rates filed by the utility to become effective, there was no action by the Board reviewable by writ of certiorari.

NEW YORK COMMISSION: *Re United Traction Company.* The Commission ordered the transfer of capital stock of the United Traction Company operating electric railways in Albany County to the Associated Gas & Electric Company to be rescinded upon a finding that, after becoming affiliated, contracts were made by the operating company with other subsidiaries owned by the Associated Gas & Electric Company of more than 10 per cent of the capital stock of an operating utility was contrary to law, and "void and of no effect whatever."

OHIO SUPREME COURT: *New York Central v. Public Service Commission.* A steam railroad company operating a motor trucking business or bus business on the public highways of Ohio was held to be a motor transportation company within the jurisdiction of the Public Utilities Commission so as to require a certificate of convenience and necessity for operation.

OKLAHOMA COMMISSION: *Re Slick Gas Company.* A gas utility was authorized to abandon service in the town of Slick after April 1, 1930, as a result of a decline in the population and a consequent loss in revenue.

PENNSYLVANIA COMMISSION: *Pennsylvania Railroad v. Robinson.* A motor carrier of freight operating under a contract with an association composed of shippers was directed to discontinue such service in the absence of a certificate issued by the Commission because of the fictitious nature of the relationship.

SOUTH DAKOTA COMMISSION: *Re Dakota Central Telephone Company.* Rate increases were allowed at Britton, Hecla, and Veblen (S. D.) telephone exchanges.

WISCONSIN COMMISSION: *Nelson v. Stoughton.* A petition by eight citizens requesting that the municipal electric plant at Stoughton be ordered to extend lines for service to them was denied in view of the existing adequate service rendered by the Wisconsin Power & Light Company in the territory affected.

WISCONSIN COMMISSION: *Re Milwaukee Electric Light & Railway Company.* An application for the installation of one-man street cars in the city of Milwaukee was approved over the objection of the city.

WYOMING COMMISSION: *Re Rate Structures of Steam Railroads.* This was an endeavor to harmonize conflicting freight rate schedules of steam railroads under the Wyoming Public Service Act to co-operate with the Interstate Commerce Commission.

The Utilities and the Public

The New York Investigating Commission Makes Its Report

Now that the political fog has blown away from the investigation of the New York Commission and both the majority and minority members of Governor Roosevelt's investigating commission have filed their reports and the solons at Albany have settled down to the serious work of framing legislation to revise the New York Public Service Commission law, we can at last analyze the recommendations of both factions without partisan pressure.

It was unfortunate that the political element has been injected so persistently into the deliberations of a body engaged in such important and constructive work, but that was inevitable under the circumstances and probably did little real harm. The investigation commission accomplished a great deal. From its findings and recommendations will grow regulatory legislation not only in New York state but throughout the Nation. The 1907 New York law fathered by Governor Hughes, now Chief Justice of the United States, has served as a pattern for other states. Experience has revealed some defects and insufficiencies in that law and now, in 1930, the Empire State still promises to point the way in public utility regulation.

Although in excess of a thousand major and minor revisions of the 1907 law were suggested, there were four salient points that are of national interest and concerning which much real data were collected and recommendations deserving serious considerations were proposed.

The first and chief point was the ancient problem of valuation. Testimony taken at the hearing revealed this as the sorest spot in Commission regulation. It has ever been a long drawn out, expensive, and messy proceeding, and the result is usually an arbitrary compromise figure, or, as Father John A. Ryan says, "a guess based on guesses."

The majority recommends that the Commission be authorized to enter into voluntary contractual agreements with the utility companies whereby the initial valuation shall be used as the rate base for a period up to ten years with adjustments for additions made during the period of the contract. At the end of the period, the valuation would be revised and a new agreement executed. The valuations are to be made "according to the factors prescribed by the law of the land."

The minority recommends legislation that would "freeze" the rate base of public utilities according to the same factors of value recognized by the majority's plan, but the rate base would then remain unchanged except for additions to plant regardless of price fluctuations. Some doubt has been expressed as to the constitutionality of this proposal. This embraces

the main features of the celebrated "Bauer plan" described by its author in this issue.

The second point of national interest brought out was the question of whether the Public Service Commission should function as a *quasi*-judicial body or, as Governor Roosevelt suggests, strictly as an administrative body to "protect the interest of the public." By the "public" the Governor presumably means the ratepayers. Both majority and minority appeared to agree that one remedy for this problem was the appointment of a People's Counsel.

A third point was made about the interference of Federal district courts in utility litigation before the state courts have an opportunity to pass on it. While there is little the state can do about this, both sides agreed that the state should do all it could and that congressional legislation should be sought to restrict Federal courts from taking jurisdiction until state remedies have been exhausted.

A final point was made about holding companies. Both factions recommended legislation extending the jurisdiction over holding or "affiliated" companies. Such companies were defined in the majority report. There seems little doubt but that legislation of this nature will soon be enacted at Albany.

There were other points of local and national interest. The majority on the whole seems to be of the opinion that the Public Service Commission law has become somewhat obsolete and simply needs to be brought up to date. The tone of the minority report would seem to indicate that Commission regulation has failed but ought to be given a last chance before abandoning it in favor of government operation, which is encouraged as a substitute and probable successor to the present set-up of utility operation.

In any event, as Mr. W. M. Kiplinger in the New York *Times* says, "New York is doing a job of thinking for the whole Nation." The outcome of these reports promises to have a lasting effect upon the future of utility regulation throughout the land.

A Holding Company Is Not Engaged in "Doing Business"

THE Missouri Commission has squelched a move by the city of St. Louis to dismiss an application of the Utilities Power & Light Corporation, a holding company, for authority to acquire in excess of 10 per cent of the capital stock of a Missouri utility. The city had contended that the applicant, being a Virginia corporation, could not do business within the state without securing a license from the Missouri Secretary of State.

The Commission, while admitting that such was the law, ruled that the law was not applicable to the situation involved because the mere purchase of utility stock by a holding company did not constitute "doing business" within the meaning of the act. The Commission, in granting the application, pointed out that the transfer of the stock could have no effect on public interest in view of its own superior jurisdiction over the subsidiary.

Columbus Gas Ordinance Case Is Continued

THE Ohio Commission has refused for the present to entertain a complaint by the Columbus Gas & Fuel Company against the validity of an ordinance of the city of Columbus to regulate the rates for natural gas in that city. The ordinance is known as the "48-cent ordinance" and has received the approval of the people of Columbus at the polls. The utility appealed from its enforcement on grounds that it was unjust and confiscatory.

The reason for the Commission's refusal to take any action was because the utility had previously appealed to the Federal district court against the validity of a former 65-cent ordinance. The Federal court held that ordinance to be invalid because of the failure of the voters to pass upon it according to Ohio law. The city appealed to the United States Circuit Court of Appeals from this decision and the appeal is still pending. The Commission in its opinion stated:

> "In the complaint of the Columbus Gas & Fuel Company *v.* the City of Columbus, filed in the District Court, April 29, 1925, and still pending in the United States Circuit Court of Appeals, the company in invoking the jurisdiction of the Federal court, set out at great length its reasons why the Public Utilities Commission of Ohio is not a suitable tribunal for the determination of the questions presented in that complaint.
>
> "The reasons were so numerous that it required two full printed pages of the record (pages 133, 134, 135) to enumerate them. See transcript of case No. 5623 in the United States Circuit Court. The reasons still have weight."

The Commission said that, as much as it wished to facilitate the hearing, it was convinced that it would be better to continue the case until the Federal appeal was disposed of. The motion of the city for a continuance was sustained.

Utilities' Bonds Are Not Permitted for Financing an Ice House

THE Nebraska Commission has decided that a public utility company should not be permitted to issue bonds to reimburse it for the expenses made for non-utility property where they might burden the utility's property. This decision was made upon an application of the Central West Public Service Company of Nebraska for authority to pledge its first mortgage bonds on the acquisition of certain ice house properties which were admittedly non-utility in character.

The Commission pointed out that the ice plant was not connected with the utility's property and was not auxiliary to them or so constructed as to utilize the by-products of any of the utility's operations.

Authority was refused because the Commission said that if the application were granted the bonds might become a burden on the company's property or might hinder the utility's service since they would be a lien on the utility property as well as the non-utility property. Other security issues requested were authorized.

Coal Clause Eliminated from Electric Rate Schedule

THE Indiana Commission in a recent petition of the Indiana Service Corporation to establish new rates in the towns of Geneva and Berne, Indiana, vetoed a proposal to include a so-called "coal clause" in the tariffs of the utility. The opinion of the Commission stated:

> "While it is quite likely that the power rates on large quantities as shown in the tariffs are more or less related to the coal consumption, it would appear that the Commission is without power to confer authority for increasing rates contingent upon some future happening, and that it would be necessary for the Commission to determine whether or not the price of coal had increased or decreased. Therefore, it makes little or no difference whether the coal clauses are placed in the tariff or not, for the reason that it would be necessary for the Commission either on petition of the consumer or the utility, to ascertain the prevailing price of coal before allowing an increase or reduction in rates, on the theory that no increase in rates can be allowed without a public hearing."

This may possibly serve as an important precedent in future similar proceedings.

Ice Business Declared a Public Utility in Arkansas

THE Supreme Court of Arkansas has sustained the constitutionality of a law enacted in 1929 by the legislature of that state declaring the ice business to be a public utility and placing it under the jurisdiction of the Railroad Commission. The decision, however, held invalid those portions of the act which forbid the Commission to issue a certificate of convenience and necessity to an ice manufacturer to do business in any territory where existing facilities were sufficient.

The court held that the invalid sections of the act violated sections of the state Constitution safeguarding the rights to citizens to acquire and enjoy any right, privilege, or immunity upon equal terms with all other citizens as well as a section prohibiting monopolies and perpetuities. The court acknowledged the arguments in favor of an economic policy of regulated public monopolies but stated:

> "This may be a sound economical policy, but we cannot consider the expediency of these provisions, for the question for our determination is not that of policy, but of power. In our opinion, these provisions run counter to the genius and policy of our organic law, because the virtual effect of the provisions in the statute adverted to is the creation of monopolies, which are abhorrent to the principles of common law and which are expressly inhibited by the framers of our Constitution."

And so it appears that unless the state Constitution is changed, Arkansas will remain in the small group of states whose policy affirms the questionable aphorism that "competition is the life of trade."

Public Utilities Reports

COMPRISING THE DECISIONS, ORDERS, AND RECOMMENDATIONS OF COURTS AND COMMISSIONS

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Re Lincoln Telephone & Telegraph Company

[Application No. 7886.]

Service — Discontinuance — Duplication of facilities — Lack of franchises.

A telephone company which had been rendering service without a franchise for twenty years to a small group of subscribers located in a territory served by a competing utility was refused authority to discontinue such service on the grounds of duplication of service, and it was obliged to relocate its lines, where it appeared that both a franchise and a substitute line routeing could be secured without serious difficulty.

[November 30, 1929.]

APPLICATION *of a telephone company for authority to discontinue certain service extensions; denied.*

APPEARANCES: L. P. Young, District Manager, Hastings, and J. P. Lahr, Manager, Hastings, for the applicant; R. L. McMullen, Doniphan; H. G. Heintz, Doniphan; F. C. Glazier, Doniphan; Archie Haggard, Doniphan; and Henry Marquardt, Doniphan, for the protestants.

CURTISS, Chairman: This application is presented by the Lincoln Telephone & Telegraph Company for authority to discontinue what is known as its No. HA-39 line, which serves five business subscribers in the town of Doniphan through the medium of a circuit which terminates in applicant's Hansen office.

Protest to the granting of the request having been made, hearing upon the application was held at Doniphan on October 21, 1929, the above noted appearances being made.

The facts are not in dispute. For approximately twenty years applicant has had this line running into Doniphan from its Hansen switchboard, serving always a very limited number of business subscribers in Doniphan. The service carried with it the privilege of free service to Hastings, which was enjoyed by all subscribers of the Hansen exchange. Of recent date semi-automatic switchboard equipment has been installed at Hansen, and Doniphan service has been changed from magneto to common battery, but free exchange of service with Hastings is still enjoyed. Other than these five subscribers, no Doniphan telephone users are served by applicant.

The Hamilton County Farmers Telephone Company maintains an exchange in Doniphan, serving a large number of local residents, including the five subscribers of appli-

cant. Farm subscribers to the northeast, east, and southeast of Doniphan are also served by the Hamilton County company through its Doniphan switchboard. Farm subscribers to the northwest, west, and southwest of Doniphan are served by applicant through its Hansen switchboard.

Applicant points to this so-called duplication of service in Doniphan as one of the reasons justifying its withdrawal from this particular territory. It also points out that it owns no pole line in Doniphan and holds no franchise rights to construct pole line within the corporate limits of the town. Furthermore, it states that for many years, in serving these five subscribers, it has used toll poles of the Northwestern Bell Telephone Company in carrying the necessary wires from its own pole line adjacent to Doniphan, into and within the corporate limits of the town; that on May 9th, last, it was notified by Northwestern Bell representatives that a relocation of the Bell toll line through Doniphan involved the abandonment by the Bell Company of these particular poles; that subsequent thereto, these particular poles were sold to the Hamilton County Company; that applicant has made every effort to secure attachment privileges from the Hamilton County Company for the use of poles within Doniphan, but that such application has been denied by the Hamilton County Company, which stated that "better telephone service can be rendered by having but one local service in the community."

Accordingly, applicant, if it is to continue to serve these subscribers, must construct certain additional limited pole line, largely within the corporate limits of Doniphan, and must secure from town authorities, the necessary franchise rights. This it does not desire to do, recognizing the impropriety of what it calls duplicate service in the same community.

Protestants allege that in so far as the service itself is concerned, it is not a duplicate service. They point out that the service which they secure from applicant is entirely a different service than the service which they secure from the Hamilton County Company. Quite naturally the Hamilton County exchange is used in making local calls, either urban, or to rural subscribers served by this company. Service of applicant is utilized by protestants in calling farmers served by applicant in Doniphan trade territory; also, in business calls to Hastings. Protestants insisted that Hastings service was of tremendous importance to them; that because of this service arrangement which has been in existence for a period of approximately twenty years, business relations between Doniphan and Hastings have been built up which will be demoralized if the service is to be now discontinued. They also pointed out that toll calls to Hastings would of necessity be routed through Grand Island; that accordingly, in their opinion, they would be slow and unsatisfactory because of circuitous routeing. Protestants insisted that they were making an active effort to police the use of service, that the same might not be abused by nonsubscribers not entitled to it. Applicant representatives agreed that

this was being done, and offered no complaint respecting this matter. It was also stated by applicant representatives that this service had always been furnished to all persons in Doniphan who requested it.

The fact that the number of users over a period of many years has always been small, indicates that the future demand, if the service be continued, will probably in nowise embarrass applicant by lack of necessary facilities; also, that the local competition such as it is between applicant and Hamilton County Company, will be relatively unimportant.

The Commission concludes that equities demand a denial of the request. Applicant apparently recognized a right of these subscribers to a continuation of a service which they had enjoyed for twenty years, when it made request of the Hamilton County Company for the use of their poles in Doniphan, whereby such service might be continued. The conditions which confront applicant, as a result of this denial, do not seem to justify the granting of the request. The placing of a few poles will be necessary. The securing of a franchise, under the existing circumstances, will probably not be difficult. The Hamilton County Company can obviate this necessary procedure on the part of applicant and avoid the granting of a franchise to a competing company by permitting applicant, for a reasonable charge, to use the few poles necessary in Doniphan. The competition complained of by the Hamilton County Company is not a new thing. Neither is it of such proportions as to occasion any alarm, especially having in mind the fact that each of the five subscribers of applicant is a subscriber also of the Hamilton County Company.

Under the circumstances, the Commission concludes that the application should be denied.

ORDER

It is therefore *ordered* by the Nebraska State Railway Commission that the request of Lincoln Telephone & Telegraph Company for authority to discontinue its Line No. HA-39, extending from Hastings to Doniphan, be, and the same is hereby denied.

NORTH DAKOTA DISTRICT COURT, SECOND JUDICIAL DISTRICT

Re First Farmers Telephone Association of Lansford

Constitutional law — Property rights — Municipal powers.

1. A municipality has a constitutional right to say finally who shall use its streets and alleys for telephone purposes, p. 118.

Franchises — Operation after expiration — Requirements of notice.

2. A city which has permitted a telephone utility to continue to operate after the expiration of its franchise may not oust the company until it does some affirmative act showing a decision to terminate such a condition and gives a reasonable notice to the company to quit the locality, p. 118.

Certificates — Evidence of necessity — Competitive franchise.

3. The mere issuance by a city, which has permitted a telephone company to continue its operation after the expiration of its franchise, of a new franchise to a competitive company is not sufficient to show any need of another system where the city has not taken some positive act to put an end to the operations of the first company, p. 118.

Monopoly and competition — Jurisdiction of the Commission — Operation after expiration.

4. The Commission has no authority to issue a certificate to a telephone company to do business in a city which has permitted another company to continue to operate after the expiration of its franchise, and has taken no positive step to abrogate such hold-over operations, where such operations are sufficient to meet the needs of the city, p. 118.

Public utilities — Charters — Commission jurisdiction.

5. The Railroad Board may properly refuse to pass upon the implied powers of a telephone company delegated to it by authority of its corporate charter, p. 119.

Certificates of convenience and necessity — Condition — Franchises.

6. The validity of a franchise possessed by an applicant for a certificate to operate a telephone utility is immaterial where the law does not require the issuance of such certificate to be conditioned upon the acquisition of a valid franchise, p. 119.

Injunction — Powers of Commission — Operation after franchise expiration.

7. A Railroad Commission has no jurisdiction to issue an order restraining a telephone company, which has been operating after the expiration of its franchise with the implied permission of the city, from further operations, where the law limits the power of the Commission to issue such restraining order to utilities operating under franchises granted subsequent to a certain date or commencing operation since such date, p. 119.

Monopoly and competition — Operations after expiration of franchise — Telephones.

8. An order of the Railroad Commission refusing the holder of a newly issued franchise authority to operate a telephone utility in a city, where another company is still permitted to operate after the expiration of its franchise because of adequacy of such existing service, does not prevent such applicant from making a new application at a later date should the city oust the existing utility, p. 119.

[November 21, 1929.]

APPEAL *from an order of the Railroad Commission refusing to award a certificate of public convenience and necessity to a telephone utility; order of the Commission approved.*

GRIMSON, J.: This comes before the court upon an appeal from the order of the Board of Railroad Commissioners. The First Farmers Telephone Association applied for a certificate of public convenience and necessity to operate and maintain a telephone system in the city of Lansford. Shortly afterwards they also petitioned the Board of Railroad Commissioners for an order restraining the Northwestern Bell Telephone Company from operating a telephone system in Lansford. Thereafter the Northwestern Bell Telephone Company applied for a certificate of convenience and necessity to construct and maintain a telephone exchange in Lansford. All three petitions were docketed and later by consent a joint hearing was had upon all petitions and upon said hearing the Railroad Commission entered its order denying both applications of First Farmers Telephone Company but granting the application of the Northwestern Bell Telephone Company for a certificate of public convenience and necessity conditioned upon their obtaining a franchise from the city of Lansford. From that order this appeal was taken.

Under the law 4609c34 to 4609c36, inclusive, the district court on such appeal inquires into the lawfulness of the decision or final order made and determines the same on the record of the Commission as certified to it. State v. Great Northern R. Co. (1928) 56 N. D. 822, P.U.R.1928E, 111, 219 N. W. 295; North Dakota State Highway Commission v. Great Northern R. Co. (1924) 51 N. D. 680, P.U.R.1925B, 697, 200 N. W. 796; State ex rel. Hughes v. Milhollan (1923) 50 N. D. 184, 195 N. W. 292.

The main question before the Board of Railroad Commissioners was whether or not the evidence before it showed that the First Farmers Telephone Association was entitled to a certificate of public convenience and necessity. The evidence showed that said association was a farmers telephone company which had, up to that time, been engaged in furnishing telephone service to farmers in the vicinity of Lansford; that the Northwestern Bell Telephone Company had an exchange in Lansford, furnished service to the people of Lansford and had arrangement with the First Farmers Telephone Association whereby they connected with said system at the city limits of Lansford. The evidence further showed that the service furnished by the Northwestern Bell in Lansford for at least the last year and a half before the hearing was satisfactory but it is argued in behalf of the First Farmers application that the Northwestern Bell had no franchise and that the facts showed they did not. Apparently their predecessor, the Northern Telephone Company, had had such a franchise and presumably such franchise was transferred to the Northwestern Bell Telephone Company but it was conceded by both sides that such franchise had expired. The application had been made by the Northwestern Bell for a franchise to the city council of Lansford but apparently no action had been taken thereon. Instead the city council had issued a franchise to the First Farmers Telephone Association. The city, however, as far as the record showed, had taken no

further action to oust the Northwestern Bell. It had allowed said company to continue in operation for several years since the expiration of the franchise. It had used the telephone service of said company and was using it at the time of the hearing. It had served no notice upon the telephone company, as far as the record shows, that it desired said company to remove its system from Lansford. It made no appearance upon this hearing, although it had been served with notice thereof.

[1, 2] Under the Constitution, the city of Lansford is the one who has the right to finally say who shall use its streets and alleys for telephone purposes. Originally it apparently gave that right to the predecessor of the Northwestern Bell. Under that right the said company had built up its telephone system, has considerable property in the city and has been giving service. It had been allowed by the city to conduct such service after the expiration of the franchise. Under such circumstances it seems to this court that the Northwestern Bell Telephone Company has been allowed to continue under an implied consent and agreement; that to terminate such condition a reasonable notice is necessary on the part of the city to the telephone company and some affirmative act taken by the city to show the decision to terminate such implied agreement and to oust the telephone company. This seems, to the court, to be the more reasonable and equitable rule. See Hill v. Elizabeth City (1924) 298 Fed. 67; Cedar Rapids Water Co. v. Cedar Rapids (1902) 118 Iowa, 234, 91 N. W. 1081; Doherty & Co. v. Toledo R. & Light Co. (1918) 254 Fed. 597, P.U.R. 1919C, 230; Toledo v. Toledo R. & Light Co. (1919) 259 Fed. 450; Louisville v. Louisville Home Teleph. Co. (1922) 279 Fed. 949; Denver v. Denver Union Water Co. (1918) 246 U. S. 178, 62 L. ed. 649, P.U.R. 1918C, 640, 38 Sup. Ct. Rep. 278; Detroit United R. Co. v. Detroit (1919) 248 U. S. 429, 63 L. ed. 341, P.U.R.1919A, 929, 39 Sup. Ct. Rep. 151.

[3, 4] Counsel for the First Farmers Telephone Company argues that because the Northwestern Bell has no franchise it should be considered as trespasser and considered as if already removed and absent from the city. As above indicated, the court cannot hold that it is a trespasser and certainly cannot see how it can be considered as not in the city. It is there and furnishing service. As long as that condition actually exists there seems no occasion for another telephone company to go in there. The mere fact that the city has given a franchise to the First Farmers is not sufficient to show any need of another system. There must be some positive act taken by the city to abrogate the condition that now exists between the city and Northwestern Bell to show that they will not allow them to continue business any further, to show that system will not continue much longer and that, therefore, there is a necessity for another system to enter. The whole purpose of the law requiring the certificate of convenience and necessity as well as of § 4812a10 Supplement C. L. 1913 is to prevent duplication. As long, therefore, as there is one complete system operating in Lansford and as long as

the city has taken no further action in the matter to terminate the services of that system, there is no need of another system. We have to look at the facts as they are in the record and cannot speculate or imagine things that do not exist. Until, therefore, the city takes some further action there is nothing that the Board of Railroad Commissioners could do except what they did, namely: to refuse a certificate of convenience and necessity to the First Farmers Telephone Association.

[5] Counsel for the Northwestern Bell raises some legal objections to the charter of the First Farmers Telephone Company and its authority thereunder. The Railroad Board rightly refused to pass upon that matter and as it decided the question upon its merits there is no need to consider that objection. This court is, however, under the impression that under the doctrine of implied powers the charter of the First Farmers Telephone Company is broad enough to allow them to operate this exchange, if necessary.

[6] Likewise, the matter of whether the Farmers Telephone Association had a valid franchise from the city of Lansford, at the time of the hearing, becomes immaterial. If they are entitled to a certificate of convenience and necessity the law allows that to be conditioned upon their acquiring a franchise if they do not already have one.

[7, 8] With regard to the application of the First Farmers Telephone Company for an order restraining the Northwestern Bell from operating, this court is of the opinion that the Railroad Commission correctly adjudged it had no jurisdiction. Such an order can be granted by the Board only upon conditions expressed in the chapter 235 of 1927 Session Laws. Those conditions have been construed in the case of Olson v. Erickson (1928) 56 N. D. 468, P.U.R.1928D, 300, 217 N. W. 841. Considering that chapter and this decision of the supreme court, this court is of the opinion that the Northwestern Bell Telephone Company does not come under the conditions allowing the Board to issue such an order to restrain it. Such conditions are either it is operating under a franchise granted since July 1, 1927, or that it was operating under franchise granted before that time but under which they had either not begun operations for a year after it was granted or had ceased operation and been suspended for more than a year. Here the Northwestern Bell was operating under an expired franchise at the sufferance of the city. It had never suspended operations. Clearly, therefore, it does not come under the provisions of that chapter and the Board of Railroad Commissioners correctly decided it had no jurisdiction to issue such order.

Then remains the application of the Northwestern Bell Telephone Company for a certificate of necessity and convenience. This has become more or less of a moot question. Under Chapter 235 of 1927 Session Laws it did not require such a certificate unless it got a new franchise. Chapter 198 of 1929 Session Laws amends Chapter 235 by adding a clause that such a certificate is not required where the company has not suspended operation and the franchise merely

replaces or renews an expiring or expired franchise. Under the law as it was, the Northwestern Bell did not need a certificate unless it got a new franchise. Under the law, as it now is, it does not even need it then. Upon the record, however, before the Board of Railway Commissioners and upon conditions as they existed at that time then certainly if the city of Lansford granted a franchise to the Northwestern Bell, they needed a certificate of convenience and necessity and upon the evidence before the Board their decision to issue such a certificate conditioned upon the Northwestern Bell obtaining a franchise was correct.

This court does not mean to imply that it is necessary that the Northwestern Bell be absolutely removed from the city before a certificate may be issued to the First Farmers Telephone Association but it does believe that some affirmative action is necessary upon the part of the city to show, not only that it has granted a franchise to the farmers, but, that it has stopped the relations existing between it and the Northwestern Bell and actively terminated the implied license granted the company by permission to remain. It is a matter primarily for the decision of the city of Lansford, a right guaranteed them by the Constitution. All that the Board of Railroad Commissioners can do is to pass upon the necessity for a system to enter a given place and as long as there is one complete system operating satisfactorily and obeying the order of the Board of Railroad Commissioners there seems no need and the Board of Railroad Commissioners can go no further than to inquire into that one question.

This does not prevent the First Farmers Telephone Association from making a new application for a certificate of convenience and necessity if the city of Lansford takes definite steps to terminate the services of the Northwestern Bell Telephone Company, and when it becomes certain that said telephone company can not operate its exchange system there. This decision is without prejudice to a new application in the event such showing can be made.

The order of the Railroad Commission will, therefore, be affirmed and the attorneys for the Northwestern Bell Telephone Company may draw up the necessary papers in accordance herewith.

NEW YORK DEPARTMENT OF PUBLIC SERVICE
STATE DIVISION, PUBLIC SERVICE COMMISSION

Re Westchester Electric Railroad Company et al.

[Case No. 5803.]

Leases — Commission approval — Railroads.

1. The Commission cannot approve a lease which covers a railroad route

for which the Commission has given no certificate of convenience and necessity, and may not ever do so, p. 123.

Monopoly and competition — Railroads — Commission approval.

2. The Commission approved a voluntary settlement of two rival railroads of vexatious question involving the convenience of travelers of both transportation agencies and arranged for an interchange of transfers in a certain city giving an added convenience to the travelers of each line, but the Commission refused to foreclose itself from the possibility of action in the approval of any extension of the route which the circumstances arising in the years covered by the agreement might warrant, p. 124.

Leases — Waiver of notice by stockholders — Railroads.

3. The unanimous consent and waiver of all the stockholders of each corporation principal to a lease was held to obviate the necessity of a formal meeting, p. 124.

[October 27, 1929.]

JOINT PETITION *of two railway companies for approval of a lease of certain rights, routes, franchises, and equipment; granted in accordance with the opinion herein.*

APPEARANCES: Graham McMahon, Buell & Knox, by Ralph T. Buell, New York, for the New York & Stamford Railway Company; Alfred T. Davison and Victor McQuistion, for Westchester Electric Railway Company.

VAN NAMEE, Commissioner: The railroad companies ask the approval of the Commission to a lease and its exercise in accordance with its terms as required by § 148 of the Railroad Law and § 54 of the Public Service Commission Law. Hearing held October 8, 1929.

The route: On the Boston Post road in the town of Mamaroneck, between the westerly boundary line of the village of Larchmont and the easterly boundary line of the city of New Rochelle, and in the city of New Rochelle, as follows:

Westbound

On Boston Post road (also known as Main street) from the easterly line of the city of New Rochelle, west on Main street (also known as Boston Post road) to Rose street; north on Rose street to Huguenot street; west on Huguenot street to Bridge street; north on Bridge street to Railroad place; west on Railroad place to Mechanic street; south on Mechanic street to Mechanic street terminal;

Eastbound

From Mechanic street terminal south on Mechanic street to Huguenot street; east on Huguenot street to Lawton street; south on Lawton street to Main street (also known as Boston Post road) and east on Main street (also known as Boston Post road) to the city line. The streets and avenues hereinabove mentioned being hereinafter sometimes referred to as the "Railroad Route";

Law applicable: §148. Lease and conveyance of road. "Subject to the permission and approval of the Commission having jurisdiction, any rail-

road corporation or any corporation owning or operating any railroad or railroad route within this state may contract with any other such corporation for the use of their respective roads or routes, or any part thereof, and thereafter use the same in such manner and for such time as may be prescribed in such contract. Such contract may provide (1) for the exchange or guaranty of the stock and bonds of either of such corporations by the other, or (2) for the conveyance by one of such corporations to another corporation of the property, appurtenances, and franchises of the conveying corporation for the consideration named in such contract which may be stock, bonds, or other securities of the corporation to which such conveyance is to be made or of its successor or of another corporation, or for both of such purposes, and shall be executed by the contracting corporations under the corporate seal of each corporation; and if such contract shall be a lease of any such road and for a longer period than one year or if such contract shall provide for such conveyance, such contract shall not be binding or valid unless approved by the votes of stockholders owning at least two-thirds of the stock of each corporation which is represented and voted upon in person or by proxy at an annual meeting of the stockholders for the purpose of electing directors, called in the manner prescribed by law, provided that the notice of such meeting shall state that one of the purposes thereof will be the approval of such contract, or at a meeting, called separately for that purpose upon a notice stating the time, place, and object of the meeting, served at least thirty days previously upon each stockholder personally or mailed to him at his post office address and also published at least once a week, for four weeks successsively, in some newspaper printed in the city, town, or county where such corporation has its principal office, and there shall be indorsed upon the contract the certificate of the secretaries of the respective corporations under the seals thereof, to the effect that the same has been approved by such votes of the stockholders, and the contract shall be executed in duplicate and filed in the offices where the certificates of incorporation of the contracting corporations are filed. The road of a corporation cannot be used under any such contract in a manner inconsistent with the provisions of law applicable to its use by the corporation owning the same at the time of the execution of the contract. Such contracts shall be executed by the corporations, parties thereto, and proved and acknowledged in such manner as to entitle the same to be recorded in the office of the clerk or register of each county through or into which the road so to be used shall run. If any contract so recorded shall be or has been terminated by the contracting corporations in pursuance of resolutions of their respective boards of directors prior to the time specified in such contract for the termination thereof, then the contracting corporations shall execute, acknowledge, and procure to be recorded in each office where such contract is recorded a certificate to the effect that such contract has been terminated, stating the date of the termination thereof, and said certificates so recorded shall be pre-

sumptive evidence of the termination of such contract accordingly. Nothing in this section shall apply to any lease in existence prior to May first, eighteen hundred and ninety-one."

§ 54. Transfer of franchises or stocks. "1. No franchise nor any right to or under any franchise, to own or operate a railroad or street railroad shall be assigned, transferred, or leased, nor shall any contract or agreement with reference to or affecting any such franchise or right be valid or of any force or effect whatsoever, unless the assignment, transfer, lease, contract, or agreement shall have been approved by the proper Commission. The permission and approval of the Commission, to the exercise of a franchise under § 53, or to the assignment, transfer, or lease of a franchise under this section shall not be construed to revive or validate any lapsed or invalid franchise, or to enlarge or add to the powers and privileges contained in the grant of any franchise or to waive any forfeiture."

§ 50a. Substitution of busses for cars on tracks, on street surface or other railroad route and supplemental bus operation. "Whenever the Commission shall be of the opinion, after a hearing, had upon the application of any street railroad corporation or railroad corporation, that the public interest will be served by the operation of stages, busses, or motor vehicles, *wholly or partly* in place of *or supplemental to* cars or trains upon tracks, on any portion of the route of such railroad, the Commission may make an order authorizing such *whole or partial* substitution *or such supplemental operation*, and thereupon such corporation shall be authorized to operate stages, busses, or motor vehicles on such portion of its route."

§ 50b. Provision for contracts between railroad corporations and omnibus corporations owned by former; approval of Commission necessary. "Whenever the Commission has made an order authorizing any street railroad corporation or railroad corporation to substitute the operation of stages, busses, or motor vehicles in place of cars or trains upon tracks on any portion of the route of such railroad, and such corporation is the owner of all of the capital stock of an omnibus corporation, such street railroad corporation or railroad corporation and such omnibus corporation may, subject to the approval of the Commission contract for the use of their respective routes, or any part thereof, upon which stages, busses, or motor vehicles may be operated, and such routes shall thereafter be used in such manner and for such time as may be prescribed in such contract."

Lease.

The approval of an operating agreement is sought. This is a lease extending for a period of ten years which for convenience has been dated January 25, 1929. It covers the route herein affected and also other routes which it is intended will be secured by the Westchester Electric Railroad Company in the future in the city of New Rochelle and elsewhere.

[1] The lease also provides against competition by the New York & Stamford Railway, the County Transportation Company and the New York & Westchester & Boston Railway Company. The latter is not

a party to this agreement, however. The prayer of the petitioners is for the approval of the lease in its entirety. It is obvious that the Commission cannot approve a lease which covers a route for which the Commission has given no certificate of convenience and necessity and it may not.

[2] The Commission should not foreclose itself from the possibility of action in the approval of any extension of the New York & Westchester & Boston Railway which the circumstances arising in the years covered by this agreement might warrant. To so much of the agreement as relates to the route set forth in the petition in paragraph "3" thereof and leads to the protection thereof, the Commission can and should give its approval. It is a voluntary settlement of a vexatious question involving the convenience of travelers of both rival transportation agencies and arranges for an interchange of transfers in the city of New Rochelle thus giving an added convenience to the travelers of each line.

The petition calls for the approval of an agreement to permit the leasing of a street railroad route owned and operated by the Westchester Electric Railroad Company in the city of New Rochelle, and in a small portion of the town of Mamaroneck and which is now operated by busses under approval given by the Commission in Case No. 5115 to the New York & Stamford Railway Company which intends to have this route operated by its subsidiary, the County Transportation Company.

[3] Section 148 of the Railroad Law provides that a lease which extends over a year must have the approval of the stockholders owning at least two-thirds of the stock of each corporation represented in the lease at a meeting duly called as therein described after statutory notice. The lease herein described is not executed or authorized as prescribed by § 148 but a substitute authorization has been obtained, namely, the unanimous consent and waiver of all the stockholders of each corporation principal to the lease.

That notice can be waived has been repeatedly held by courts in various jurisdictions, (Cook on Corporations 8th edition, Vol. III. p. 2096). Unanimous consent obviates the necessity of a formal meeting. The following cases bear out the above assertions. Re Hammond (1905) 139 Fed. 898; Beggs v. Myton Canal & Irrig. Co. (1919) 54 Utah, 120, 179 Pac. 984; Simon Borg & Co. v. New Orleans City R. Co. (1917) 244 Fed. 617; Weinburgh v. Union Street R. Advertising Co. (1897) 55 N. J. Eq. 640, 37 Atl. 1026; Germer v. Triple-State Nat. Gas & Oil Co. (1906) 60 W. Va. 143, 54 S. E. 509; Stebbins v. Merritt (1852) 64 Mass. 27; Richardson v. Vermont & M. R. Co. (1872) 44 Vt. 613; Tompkins v. Sperry, Jones & Co. (1903) 96 Md. 560, 54 Atl. 254; Gray v. Bloomington & N. R. Co. (1905) 120 Ill. App. 159; Guaranty Loan Co. v. Fontanel (1920) 183 Cal. 1, 190 Pac. 177; Stutz v. Handley (1890) 41 Fed. 531; 139 U. S. 417, 35 L. ed. 227, 11 Sup. Ct. Rep. 530; Re Keller (1906) 116 App. Div. 58, 59, 101 N. Y. Supp. 133.

The franchises under which the Westchester Electric Railroad Com-

pany operates in New Rochelle and in the town of Mamaroneck run to the grantee, successors, assigns, and leases, so they are broad enough to permit this lease and operation by the New York & Stamford Railway Company or even by its subsidiary, the County Transportation Company, Incorporated, so far as the franchises provide.

This Commission approved the operation of busses by the County Transportation Company, Incorporated, on franchise routes of the New York & Stamford Railway Company on joint petition of both by its order made in Case No. 5604 on June 12, 1929. Such routes approved were set forth in such order and the route therein described began or terminated at Dean place where the westerly boundary line of the village of Larchmont intersects the Boston Post road and is the point where the route covered by the lease in this proceeding, set out in paragraph "3" of the petition herein, begins. That portion of the route set out in paragraph "3" of the petition which lies in the town of Mamaroneck and is about 1,200 feet in length, at the making of this report, is before the Commission unacted upon, upon the application of the Westchester Electric Railroad Company to substitute busses for street cars under § 50a of Public Service Commission Law. The report and proposed order are presented at this time on the supposition that the Commission will grant the prayer of such petition. The denial of the petition in that case might lead to denial of the prayer herein. Action herein should await action thereon.

The order of the Commission in Case No. 5604 cannot be construed as covering the operation of the route set forth in paragraph "3" of the petition by the County Transportation Company, Incorporated, as at the time of making of that order, the New York & Stamford Railway Company had no legal right to operate thereon and, therefore, had no foundation to rest such a petition upon and the order of approval did not grant it. If such operation is the intent, and it is the apparent intent, a further application should be made under § 50b by the last two companies above named for the approval of the same.

In view of the fact that the lease, whose approval is sought by the general prayer of the petition, contains many matters upon which the Commission cannot now act and should not now act, the approval of the Commission should be limited to so much of the lease as relates to the route set forth in paragraph "3" of the petition and the order of approval shall specify the route.

If the application herein is granted, it will obviate further proceedings in Case No. 5025 now pending which is an application of the County Transportation Company, Incorporated, for a certificate of convenience and necessity for the operation of practically the same routes, and permit final determination thereon. Section 148 of the Railroad Law quoted in full above contains the following sentence:

"The road of a corporation can not be used under any such contract in a manner inconsistent with the provisions of law applicable to its use by the corporation owning the same at the time of the execution of the contract."

The lease or contract considered here is not in conflict with such provision but in furtherance thereof.

In view of the evidence and circumstances of this case, I am of opinion that the limited approval, as above indicated, of this Commission should be given to this lease or contract between the Westchester Electric Railroad Company and New York & Stamford Railway Company in so far as it relates and is limited to the route set forth in paragraph "3" of the petition herein, and I am of opinion that such lease and proposed operation will serve a public convenience and necessity.

A proposed order is herewith submitted.

OHIO PUBLIC UTILITIES COMMISSION

South End Motor Coach Company

v.

Cleveland Railway Company

[No. 3621.]

Public utilities — Jurisdiction of the Commission — Motor utility.

1. The Commission has jurisdiction to determine whether or not a motor propelled vehicle is being operated within the state in such a manner as to make the operator thereof a motor transportation company subject to regulation provided by law, p. 127.

Certificates — When required — Motor operations by street railway.

2. A street railway company has no more right to use the public highways to conduct a common carrier business through the operation of motor busses, without first proving the convenience and necessity therefor and paying the required tax, than any other person or corporation, notwithstanding an alleged private contract with an amusement park company providing for the transportation of persons patronizing such a resort, p. 130.

[January 16, 1930.]

COMPLAINT *by a bus company against motor bus operations of a street railway company; operations ordered to cease.*

By the COMMISSION: Complaint was filed with the Public Utilities Commission July 11, 1929, and a copy thereof was duly served upon and acknowledged by the respondent, the Cleveland Railway Company.

The respondent filed its answer to the complaint on August 6, 1929.

The respondent filed a further amended answer on the 14th of November, 1929, and by leave of the Commission on November 30, 1929, the city of Cleveland filed its answer.

The cause came on to be heard on the complaint October 14, 1929, at which time application was made by the city of Cleveland to file an answer, which was granted with permission to supply and file the same at a later date. At the same time and date the Cleveland Railway Company asked and obtained leave to file an amended answer. Testimony of witnesses and various exhibits were prescribed by both the complainant and the respondent.

The cause involved the question of whether or not the respondent, "the Cleveland Railway Company" is a motor transportation company and as such is lawfully operating motor propelled vehicles for the transportation of persons for hire without first obtaining from the Public Utilities Commission of Ohio a certificate declaring that public convenience and necessity requires such operation.

From the record thus made the Commission makes the following finding of facts:

That the complainant is an Ohio corporation engaged in the operation of a bus line carrying passengers for hire between the cities of Cleveland, Ohio; Miles Heights, Ohio; Warrensville Heights, Ohio; and North Randall, Ohio, with its principal place of business at Warrensville Heights, operating under a certificate of public convenience and necessity heretofore granted by the Public Utilities Commission of Ohio, being P. U. C. O. No. 2668.

That the respondent, the Cleveland Railway Company, is engaged in the business of operating a street car line and bus lines in and about the city of Cleveland, Ohio.

That the respondent, the Cleveland Railway Company, from about the 30th day of May, 1929, to about the 15th day of September, 1929, operated its busses between the cities of Cleveland, Ohio, Miles Heights, Ohio, Warrensville, Ohio, and North Randall, Ohio, to a point in Geauga county, Ohio, known as Geauga Lake Park.

That the respondent collected for its service a charge of 35 cents from Cleveland to Geauga Lake Park.

That the route over which the Cleveland Railway Company operated was the exact route of the complainant from Cleveland to Geauga Lake Park.

That the complainant operated busses over said route under certificate of public convenience and necessity No. 2668 and that the defendant, the Cleveland Railway Company does not have a certificate of public convenience and necessity for such operation and does not pay the special tax exacted by the state of Ohio for such use of the highways.

The equipment operated was owned by the Cleveland Railway Company, the drivers of the busses were employees of the Cleveland Railway Company, the operations were supervised by a supervisor of the Cleveland Railway Company and the vehicles were operated as stated before over the public highways of the state of Ohio and the public was accepted for carriage indiscriminately.

[1] The respondent, the Cleveland

Railway Company, and the respondent, the city of Cleveland, in their separate answers contend that the authority of the Public Utilities Commission of Ohio does not extend to such operations and admit that the Cleveland Railway Company did transport persons to Geauga Lake Park but deny that the Public Utilities Commission has any authority or jurisdiction over its operations. They contend that the operations were made by virtue of a contract that the Cleveland Railway Company had with the Geauga Lake Amusement Company and which is set forth as respondent's Exhibit "B."

The following sections of the General Code have been considered by the Commission in reaching its conclusion herein:

Sec. 614-2. The following words and phrases used in this section, unless the same is inconsistent with the text, shall be construed as follows:

Any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company, or corporation, wherever organized or incorporated;

When engaged in the business of carrying and transporting persons or property, or both as a common carrier, for hire in motor propelled vehicles of any kind whatsoever, under private contract or for the public in general, over any public street, road, or highway in this state, except as otherwise provided in § 614-84, is a motor transportation company;

"When engaged in the business of carrying and transporting persons or property or both in motor propelled vehicles of any kind whatsoever, for hire under private contract but not as a common carrier over any public street, road or highway in this state, is a private contract carrier;

"The term 'motor propelled vehicle' when used in this chapter means any automobile, automobile truck, motor bus, or any other self-propelled vehicle not operated or driven upon fixed rails or tracks."

"Sec. 614-2a. The term 'public utility' as used in this act, shall mean and include every corporation, company, co-partnership, person or association, their lessees, trustees or receivers, defined in the next preceding section, except private contract carriers and except such public utilities as operate their utilities not for profit, and except such public utilities as are, or may hereafter be owned or operated by any municipality, and except such utilities as are defined as 'railroads' in §§ 501 and 502 of the General Code, and these terms shall apply in defining 'public utilities' and 'railroads' wherever used in chapter one, division two, title three, part first of the General Code, and the acts amendatory or supplementary thereto or in this act."

"Sec. 614-84. (a) The term 'motor transportation company' when used in this chapter, means every corporation, company . . . owning, controlling, operating or managing any motor propelled vehicle not usually operated on or over rails, used in the business of transportation of persons or property, or both, as a common carrier, for hire, under private contract or for the public in general, over any public highway in this state; provided, however, that the term 'motor transportation company' as used in this chapter shall not include any private contract

carrier, as defined in § 614-2, and shall not include, any . . . company or corporation, whether organized or incorporated, in so far as they own, control, operate or manage a motor vehicle or motor vehicles used for the transportation of persons or property, or both, and which are operated exclusively within the territorial limits of a municipal corporation, or within such limits and the territorial limits of municipal corporations immediately contiguous thereto, or in so far as they own, control, operate, or manage taxicabs, hotel busses, school busses, or sight-seeing busses, or in so far as they own, control, operate, or manage motor propelled vehicles, the use of which is for the private business of the owners and the use of which for hire is casual and disassociated from such private business.

"(b) The term 'public highway' when used in this chapter means any public street, road, or highway in this state whether within or without the corporate limits of a municipality."

"Sec. 614-87. No motor transportation company shall begin to operate any motor propelled vehicle for the transportation of persons or property, or both, for hire, between fixed termini or over a regular or irregular route in this state, without first obtaining from the Public Utilities Commission a certificate declaring that public convenience and necessity require such operation."

The Commission has given due consideration to the fact that § 614-84, General Code, *supra*, does contain the language relied upon by the respondent which specifically confers jurisdiction upon the Commission to hear and determine a complaint alleging that a private contract carrier has become a common carrier, and to the fact that the operations in question have been conducted in the same manner from the start, and that whatever may be the status of the respondent the case does not involve any change from a private contract carrier to a common carrier. However, the Commission cannot ignore other provisions of the same section which provide that the question whether or not any motor propelled vehicle is being operated in such a manner as to make the operator thereof a motor transportation company subject to the regulations provided by the act is a question of fact upon which the finding of the Commission shall be a final order reviewable by the supreme court.

If any further authority or procedure to hear and determine such a question is needed, it is found in other provisions of the General Code. Section 614-5, General Code, provides as follows:

"Sec. 614-5. The Commission shall have power to adopt and publish rules to govern its proceedings, and to regulate the mode and manner of all valuations, tests, audits, inspections, investigations, and hearings which shall be open to the public."

The Commission pursuant to this authority has adopted and promulgated rules, among which is Rule 11 which provides in part as follows:

"Any person, firm, company, corporation, or association, mercantile, agricultural, or manufacturing society, body politic or municipal corporation, railroad or public utility, may complain to the Commission of anything done, or omitted to be done, by any railroad, public utility, or per-

son, in violation of the laws of Ohio subject to the jurisdiction of the Commission."

Rule XI provides as follows:

"The Commission will assign a time and place for the hearing which will be at its office, in the city of Columbus, Ohio, unless otherwise ordered. Witnesses will be examined orally before the Commission, unless their testimony be taken, or the facts be agreed upon, as provided for in these rules.

"In case of failure to answer, the Commission will take such proof of the facts as may be deemed proper and reasonable and make such order thereon as the circumstances appear to require."

In this case a complaint was filed and the Commission assigned a time and place for the hearing. The respondent appeared and was heard. The Commission received the evidence and is now making a finding and order on the question of whether or not the respondent is engaged as a motor transportation company or a private contract carrier, a question which the legislature has provided shall be a question of fact upon which the finding of the Commission shall be a final order reviewable by the supreme court.

At this point the Commission finds that it has jurisdiction to hear and determine this question and to make an order therein.

[2] On the question of whether the respondent is a motor transportation company and as such required by law to apply for and receive a certificate of public convenience and necessity before operation on the public highways in the state of Ohio and pay the required tax before engaging in the business of transporting persons over the public highways in motor propelled vehicles, it should be borne in mind that the respondent in this case is the Cleveland Railway Company and not the Geauga Lake Amusement Company.

The question in this case is not what the Geauga Lake Amusement Company did but what the Cleveland Railway Company did. The controlling fact is that the Cleveland Railway Company with its equipment, with its management and with its drivers has transported persons for hire on and over the exact route of this complainant on the public highways of the state of Ohio. We are unable to see why the Cleveland Railway Company has any more right to use the public highways for the conducting of its common carrier business without first providing convenience and necessity therefor and paying the required tax than any other person or corporation who desires to operate as a common carrier and transport persons for hire over the public highways. Otherwise, by the mere subterfuge of a private contract with some person or corporation, the obligations contemplated by the law could be easily avoided.

The Cleveland Railway Company transported the public over this route and it cannot avoid the jurisdiction of the Public Utilities Commission of Ohio by a private contract with another party. If this can be done, then there is no bus law in Ohio and the state of Ohio would be compelled to maintain its highways and keep the same in repair for the use of companies operating as common carriers

and the Public Utilities Commission would be without authority.

As far as the contract between the Cleveland Railway Company and the Geauga Lake Amusement Company is concerned it speaks for itself, but it cannot set aside the laws of the state of Ohio neither can it bind the general public of the state of Ohio nor the Public Utilities Commission of Ohio.

The controlling factors are, that the Cleveland Railway Company is a corporation, controlling and managing motor propelled vehicles used in the business of transporting persons for hire over the public highways of this state; that according to the record in this case it accepted and transported the public indiscriminately, made a charge therefor, operated between various municipalities and over a regular route between fixed termini and over the exact certificated route of this complainant, that in doing these things, it became a motor transportation company as defined by the laws of the state of Ohio. (General Code 614-27 and 614-94).

The Commission, therefore, finds that the Cleveland Railway Company is a motor transportation company and it is ordered to cease all operations as a motor transportation company until it has complied with the laws of the state of Ohio and the rules and regulations of this Commission.

Note.—A similar disposition was made by the Ohio Public Utilities Commission in a related proceeding on the complaint of the Cleveland-Mahoning Valley Coach Co. v. Cleveland R. Co. No. 3636, Jan. 16, 1930.

INDIANA PUBLIC SERVICE COMMISSION

Re Laporte County Indiana Telephone Company

[No. 9875.]

Rates — Free interexchange of service — Telephones — Toll charges.

1. Free service between the exchanges of a telephone company was ordered to be eliminated and toll charges substituted therefor, in view of the congestion of lines resulting from free service and the inadequacy of service resulting from such congestion, p. 135.

Commissions — Managerial matters — Telephones — Revenues from toll lines.

2. Efforts of a telephone company's management to secure revenue from its investment in new trunk lines were regarded as matters within the discretion of the management, both as to the investment and service, p. 135.

Return — Operating expenses — Losses by storm — Telephones.

3. The Commission reconsidered its prior conclusion denying increased

rates to a telephone company on account of sleet storm damages, where, upon a subsequent introduction of evidence, the matter was brought out in a different manner and from a different view tending to show an unusual situation, p. 135.

Return — Operating expenses — Rehabilitation of telephone storm damages.

4. Overhead construction costs should not be allowed on the rehabilitation of telephone property because of damages resulting from sleet storms, where there is no proof that such charges were actually incurred, p. 137.

Return — Operating expense — Sleet storm damage — Telephones.

5. An allowance of $10.09 per mile as an estimate of the expense of pulling slack out of wires after a sleet storm was refused where all parties in a previous proceeding before the Commission had agreed upon an estimate of $7 per mile, p. 137.

Return — Operating expenses — Tree trimming — Special fund.

6. A special fund should not be established by a telephone company for tree trimming, in view of the usual practice of such utilities to carry this expense as an incidental item of current maintenance, p. 138.

Accounting — Proceeds from security issues — Depreciation reserve.

7. In authorizing the sale of securities by a telephone company whose depreciation reserve had been depleted, the Commission directed the proceeds to be used in reimbursing the reserve fund, transferring any balance remaining in said fund to the utility's treasury to reimburse the treasury for money expended therefrom as capital expenditures, p. 139.

Depreciation — Percentage allowed — Telephones.

8. A 4 per cent allowance on the depreciated book value of a telephone utility's property for a depreciation reserve was found to be inadequate and a 5 per cent allowance was established, p. 141.

[SINGLETON and MCINTOSH, Commissioners, dissent.]

[December 27, 1929.]

PETITION *of a telephone company for increased rates and authority to issue and sell securities; granted.*

APPEARANCES: Darrow, Rowley & Shields, LaPorte, for petitioner; LaPorte Chamber of Commerce, by M. J. Sallwasser, LaPorte, Farm Bureau, by Ben C. Rees, LaPorte, City of LaPorte, by K. D. Osborn, City Attorney, LaPorte, for respondents.

By the COMMISSION: August 16, 1929, the LaPorte County Indiana Telephone Company of LaPorte, Indiana, filed its petition which, omitting caption and signatures and omitting exhibits attached thereto as made a part thereof, is as follows: [Petition and list of exhibits omitted.]

History

The petitioning company in this cause acquired the properties involved in this inquiry as of January 1, 1927, as the result of a joint petition by this company and its predecessor and authorization, after hearing, by this Commission. Before the close of the year 1927 this petitioner filed application for authority to increase rates. This resulted in ap-

praisal, accounting, hearing, and granting of authority to increase rates, effective February 1, 1928.

In 1929, this petitioner filed application for authority to increase rates temporarily, on account of damage done to the physical property by snow, sleet, and wind storm May 2, 1929. This application was denied by the Commission in July, 1929.

Petition in the instant case was filed in August, 1929. Hearing was had in November following. Briefs and reply briefs were filed, and the matters inquired into will now be passed upon in formal, final order.

In all of these cases involving rates the city of LaPorte, the LaPorte Chamber of Commerce, and the Farm Bureau of LaPorte county have been active in resisting the petitions.

The predecessor of this company paid dividends each year, beginning with 1911. Prior to that time dividends had not been paid each year, but frequently. Subsequent to that time dividends were substantial and increased from year to year up to and including 1914. From 1915 to 1926, both years inclusive, dividend of $16,500 was distributed each year to the holders of common stock, except in 1918 when the dividend amounted to $14,850. During these years the property was owned and operated by the LaPorte Telephone Company. During the same years, charges for extraordinary maintenance were charged to reserve for accrued depreciation.

Fair Value

In Causes Nos. 8775 and 8776, approved January 3, 1929, the Commission found the fair value of the LaPorte Telephone Company's property as of November 1, 1926, to be $916,136, which sum included $25,000 for "working capital, including stores and supplies," and $95,000 for going concern value.

The same order, on page 4, contained the following:

"The evidence submitted to the Commission showed a considerable difference in the values placed on the physical property of the company by engineers appraising for the petitioner and the engineering department of the Public Service Commission.

"The hearing Commissioner informed the petitioners that any order approved in this cause at this time would be on the basis only of the value found by the engineering department of the Public Service Commission, plus a reasonable allowance for going value and working cash capital. Representatives of the petitioner agreed to accept such a value for the property."

In Order No. 8929, approved January 21, 1928, authorizing increase of rates, on page 10 of said order appeared the following:

"Rates will be ordered by the Commission in this cause, which will produce a total gross income of at least $61,000, making a return of between 6½ per cent and 7 per cent on the fair value of $916,136."

The above fair value found in the rate case was the same as the fair value found in the purchase and sale case heretofore referred to. Order in the rate case stated that fair value in the purchase and sale case "included non-operating property in the amount of $17,256.40. . . . The net additions to the property since the

finding of the value of $916,136 are, therefore, about equal in amount to the nonoperating property included in that value." As a fact, the net additions amount to a little more than $5,000 less than the nonoperating property, but the Commission gave the utility the benefit of the more than $5,000 in value as a rate base. The net additions and betterments above referred to included those made up to September 30, 1927, inclusive.

Mr. Grady, petitioner's witness, representing Arthur Anderson & Company, certified public accountants, and himself a certified public accountant, in Exhibit No. 8 in the instant case, showed that by the company's books the additions to property account from January 1, 1927, to September 30, 1929, amounted to $31,026.65. After Mr. Grady adjusted the company's books this amount was shown by him to be $27,841.43.

The Public Service Commission's Accounting Department made this sum, after adjustment of the books, to be $28,200.83.

The Commission's engineering department, in Commission's Exhibit C in this cause, set out that the change in material prices since the Commission's appraisal as of July 1, 1927, would increase the items included in said appraisal by $9,668.

Mr. Cook, witness for petitioner and representing W. F. Sloan & Company, appraisal engineers, Chicago, Illinois, in petitioner's Exhibit No. 7, showed that a similar application of current prices as of November 1, 1929, to the physical property appraised in W. F. Sloan & Company's appraisal as of November 1, 1926, would increase the amount of the physical property by $3,040, omitting undistributed construction expenditures, and would increase that sum by $456 more to include undistributed construction expenditures.

The testimony in both rate cases heard in 1929 showed that the property had been set up on the books of the company as of January 1, 1927, upon the basis of the appraisal made by W. F. Sloan & Company as of November 1, 1926.

The appraisal made by Sloan & Company was discarded by the Commission in the purchase and sale case and the discard of said appraisal was agreed to by these petitioners in that cause as evidenced by reference to this subject heretofore in this order. (See page 10, Commission's Orders Nos. 8775 and 8776). The set-up on the books of the company should have been on the basis of the appraisal upon which fair value was based in said purchase and sale order. However, the same appraisal by Sloan & Company as of November 1, 1926, has been in evidence in both cases heard in 1929.

In view of all the facts involved as to the fair value in this cause, the Commission will adopt fair value found in Orders Nos. 8775 and 8776 and in Order No. 8929, the latter being approved January 21, 1928, as basis for rates. To this will be added the net additions and betterments from January 1, 1927, to August 31, 1929, both inclusive, notwithstanding the fact that there is some duplication of allowance for net additions and betterments in 1927 from January 1st to September 30th of that year; also will be added the enhancement in property values on account of changes

in prices of poles, cable, etc., as applied to the physical property included in the Commission's appraisal as of July, 1927, including the time of inquiry in the instant case.

Amounts allowed by the Commission for working capital and going concern value in orders approved in January, 1927, and in January, 1928, will not be modified for the purposes of this cause.

Upon the above basis the Commission finds the fair value of the property of this petitioner as of November 1, 1929, to be $954,005. This sum includes net additions and betterments, working capital, going concern value, and enhancement of property value by changes in material prices, all as discussed above.

Taxes Increased

On account of increase in value of petitioner's property for the purpose of taxation by the State Tax Board in 1929, for taxes to be paid in 1930, the petition requested an allowance in the sum of $4,051.88 per annum.

Mr. Grady, petitioner's witness, found this sum to be $5,449.78. The Commission believes this finding to be correct and the same will be allowed.

[1] The above subject "Taxes" was referred to in paragraph 7 in the petition. The same paragraph sought relief from free service between the several exchanges belonging to this company and the substitution of toll charges therefor. The Commission believes and finds that free service between the exchanges of petitioner's property should be eliminated and toll charges substituted therefor, because of congestion of the lines resulting from free service and inadequacy of service resulting from such congestion of the lines.

[2] In this connection it was shown that petitioner has built trunk lines between exchanges in some instances for the purpose of improving the service. He now seeks to earn revenue upon this investment. The Commission regards this as a matter largely within the discretion of the management of the company, both as to investment and service, and believes that in the instant case a toll schedule should be authorized.

The same paragraph of the petition recites that rural patrons average not more than two to each mile of pole line and that this average number is less than the average number in rural territory served by similar telephone properties. The Commission finds that this allegation was proved and that consideration should be given to this fact in determining whether to authorize the substitution of toll service for free service between exchanges.

Appropriate order will be made granting authority to abandon free service between exchanges and to substitute therefor a schedule of rates for toll service.

Storm Damage of May 2, 1929

[3] In Cause No. 9794, approved July 26, 1929, P.U.R.1929E, 272, the above subject was considered at length and this petitioner's prayer for increase in rates on account of storm damage was therein denied. However, the subject of storm damage was introduced in the instant case from a different view and in a different manner. Petitioners established in the in-

stant case the fact that damage from sleet storms in this territory is more severe than usual in other territory. In the instant case particular reference was had to the storm of May 2, 1929. Testimony upon this subject was contributed by E. L. Cline, president, general manager, and chief engineer of petitioner; Fred Pyle, plant superintendent for the petitioner and by W. F. Lebo, engineer for the Public Service Commission. The extent of damage resulting from the storm of May 2, 1929, expressed in dollars, varies from not less than $140,000 (as stated by Mr. Cline) to $36,252.14 (as stated by Mr. Lebo). Mr. Cline's statement was oral; statements by Mr. Pyle and Mr. Lebo were written and made after calculation. Mr. Lebo's statement will be found in Commission Exhibit B, pages 3 and 4, as follows:

"The Commission's appraisal as of July 1, 1927, shows the average condition of the rural property as 75 per cent. I have been over more than half of rural property and it is my impression that before the storm the condition of the rural property was not over 60 per cent. In repairing the storm damage many lines have been rebuilt or built new so that now the condition is about 70 per cent.

"An inspection of the rural poles was made to determine their life in LaPorte county. These inspections were made at points where the age was known by employees of the company. Untreated poles set in 1924 show about ¼ inch rot, while treated poles set in 1924 show no signs of decay. From my inspection, I believe that poles set in 1924 have a remaining life of ten to twelve years for the untreated butts and fifteen to twenty years for the treated butts. Untreated poles set in 1919 show ¾ inch to 1 inch butt rot. I have estimated that the remaining life of these poles varies from three to ten years, depending on the diameter of the butt. For about 4½ miles between Wanatah and LaCrosse the company is now building a new line, which is to replace a very old line now on the right of way of a state road. The poles and most of the wire on this line are over seventeen years old. These poles were in very bad condition, being very nearly rotted off. The wire was badly rusted and pitted and had reached the end of its useful life. The sleet storms which occur every six years have also required the replacement of poles and wire after only five or six years' service. Another factor which has shortened the expected life of rural poles and wire has been the necessity of moving lines back on the state roads. From my inspection, I believe that the average life of untreated poles in LaPorte county is about fifteen years and that the average life of galvanized iron wire is about twelve years. The company has so very few treated poles in its system, that no special study was made for treated poles.

"On June 25, 1929, I made a report covering the storm damage to the lines of the LaPorte County Indiana Telephone Company by the sleet and snow storm of May 2, 1929. As of October 1, 1929, the company has spent $19,797.59 in repairing this damage. Of this total $11,403.56 is labor and $8,394.03 is material. I made an inspection of the work being

done by the company since my visit of June 17, 1929, and find that the main leads are being built of new material by the company and are not being repaired. In doing this work the company is building stronger and better lines than the original. Also I find that the company has been routing their lines over different roads and is not putting the lines back in the original place, but they are building new lines on different roads and removing lines from other roads. In building the new main leads, much good material has been salvaged which has been used in rebuilding the branch lines. At one point between LaCrosse and Wanatah the company is building a new line with an average of 10 wires. The length of this line is 4½ miles. This is on a state road which is to be paved and the old line is on the road right of way. The old line is at least seventeen years old and is in bad condition and needs replacing; however, this is a north and south line and was not badly damaged by the storm of May 2.

"As of October 1, 1929, the company has not made any charges to capital of the cost of the new lines. According to the telephone classification of accounts, the cost of the new lines should be charged to capital and the original cost of the lines removed should be removed from the capital account. It seems that the company should be required to make an accurate division of the total expense that should be charged to capital and to maintenance."

Mr. Pyle's statement will be found in petitioner's Exhibit No. 1 and shows his total estimate of cost of rehabilitating the company's property on account of the storm damage of May 2, 1929, exclusive of 15 per cent added on account of undistributed construction overheads, to be $50,725.57, exclusive of work of rehabilitation that had been done prior to October 1, 1929.

[4] The Commission will not allow overhead construction charges on this work, for the reason that from the revenues of the company is paid, monthly, $50 as salary to Mr. Cline as chief engineer of the company, and for the reason that there was no proof in this cause to show that such overhead charges were incurred other than the $50 monthly payment referred to above.

In Exhibit No. 1, compiled by Mr. Pyle, are included estimates for rehabilitation of some of the company's lines, the work upon which had been completed before October 1, 1929. The inclusion of estimates for such lines in Mr. Pyle's statement was, therefore, erroneous, as follows:

LaCrosse Exchange—Line 94	$548.67
Same Line	359.22
Hanna Exchange—Line 63	102.07
Union Mills Exchange—Line 28 ...	455.75
Wanatah Exchange—Line 10	436.26
Same exchange—Line 11	220.59
Same exchange—Line 14	593.76
Total	$2,716.32

[5] In Cause No. 9794, P.U.R. 1929E, 272, witnesses estimated the cost of pulling slack out of wire that had become twisted or entangled on account of the storm. In that hearing all witnesses testified that $7 per mile would be a fair approximate allowance for this work. In Exhibit No. 1 in the instant case, compiled by Mr. Pyle, he used $8.28 per mile for pulling slack out of wire in the exchange serving the city of LaPorte and vicin-

ity and used $10.09 per mile for similar work in all other parts of the territory served by this petitioner. All witnesses agreed that the allowance for this work is an estimate. All witnesses agreed upon the estimate of $7 per mile in Cause No. 9794, *supra*. The Commission's engineer sees no reason for altering his previous estimate in the instant case. The Commission believes him to be without prejudice in his estimate and will permit it to stand as a basis for the estimated cost to rehabilitate property on account of storm damage.

Mr. Pyle's estimate of cost to rehabilitate, offered but not accepted in toto, in Cause No. 9794, *supra*, was $8,369.82 greater in said cause than was his estimate submitted in the instant case after adding the $19,797.59 spent by the company in work of rehabilitation prior to October 1, 1929. It seems, therefore, that Mr. Pyle in his testimony continues to draw nearer to the estimate originally made by Mr. Lebo, of the Commission's engineering department, as time progresses. The Commission has faith in Mr. Lebo's estimate in view of the errors disclosed above in Mr. Pyle's estimate and will consider Mr. Lebo's estimate a reasonable basis for consideration in this cause.

Tree-Trimming as Deferred Maintenance

Petitioner requests an allowance of $11,000 to be used in trimming trees for the purpose of clearing lines from interference; . . . also an annual allowance of $5,000 in order to maintain the condition proposed to be created by the use of the $11,000.

The evidence showed that nothing had been done in the way of trimming trees along the rights of way and lines of petitioner since January 1, 1927—especially nothing of consequence. The president of petitioning company testified in support of the allegations in the petition.

[6] Thomas D. Pierce, one of the engineers for the Public Service Commission and a witness in this cause, presented Commission's Exhibit E, which found the condition as to tree-trimming referred to above to be apparently wholly neglected. His report showed that, in his judgment, it would require $7,350 instead of $11,000, as claimed by petitioner, to clear the petitioner's right of way and lines from foliage. His report showed also his estimate of $3,000 per year in order to maintain the condition that would result from the application of $7,350 in removing the foliage.

Tree-trimming along the right of way and lines of a telephone company's property is usually done as incidental to the maintenance work. The custom of telephone linemen is to carry their tree-trimming appliances with them in looking after the lines of poles, wire and other matters incident thereto. To set apart a special fund as requested in the petition could not carry with it the right to force the application of that fund for the purposes sought. If not used for those purposes, the Commission could reduce the rates correspondingly and at the same time provide for the elimination of the allowance. That would mean a contest that would cost the company, the patrons and the Commission unnecessary and unwise expenditures. The Commission believes

that the custom of telephone companies, which attend to tree-trimming incidentally while attending to other maintenance matters along the lines of the company, should prevail with this petitioner. Therefore, the request for these allowances will be denied. The work will not cost half as much if done while other maintenance work is being done on the lines as if done in accordance with the petition and with the report of Mr. Pierce.

Deferred maintenance of this nature is certain to affect the service. Petitioner insisted that service is good. Protestants did not successfully combat that contention. Therefore, petitioner's contention that service is good contradicts its contention for extra allowance for tree-trimming.

Extraordinary Maintenance

[7] Evidence disclosed that more or less damage by storm is suffered by petitioner's property at intervals of approximately five years. This damage occurs almost wholly in rural territory. In petitioner's property it is a matter of consequence.

Removal of Pole Lines on State Highways

Petitioner seeks increase of rates to cover expense incurred on account of changes in right of way of state highways requiring removal of pole lines, wire, etc. This is a matter that is incidental to the business. It is nonrecurring. As shown by testimony by Mr. Lebo, many lines need reconstruction, regardless of the necessity for removal. After due consideration of the evidence in this connection and of the very proper custom of practically all other public utility operators in Indiana, this request will be denied.

Stock and Security Issues

Authority is sought to issue and sell 300 shares of preferred stock, 7 per cent cumulative, $100 par value per share, at 90 per cent of par value, and 320 shares of common capital stock, $100 par value, at 85 per cent of par value. The proceeds are sought for the purpose of reimbursing the depreciation fund on account of monies used therefrom for paying for net additions and betterments and to replenish the company's treasury for money alleged to have been expended therefrom for the same purpose.

In completing the rehabilitation of the property on account of damage by storm of May 2, 1929, additional capital expenditures will be necessary. Therefore, authority will be granted to issue and sell 300 shares of preferred stock as prayed for at 90 per cent of par and 200 shares of common capital stock at not less than par. The proceeds from these issues must be used first to restore to the depreciation fund all monies expended therefrom for the purposes other than provided by law in Chap. 64, p. 210, Acts 1925.

Retirements made by the company and recorded on the books have been made on the basis of the Sloan & Company appraisal. That appraisal is too high and should not have been used as the basis of book entries, as shown in Commission's Orders Nos. 8775 and 8776. The company should be required to set its own records in order with this Commission's orders before being the recipient of chari-

table consideration by the Commission. (See Uniform System of Accounts for Telephone Companies, par. 13, p. 33.) However, in consideration of the basis upon which retirements should have been made, the Commission will grant the authority to issue securities in a sum equal to the sum of the net additions, the enhancement of property value on account of changes in material prices and an allowance for retirements at less than the values shown on the books for retirements actually made. The Commission finds this sum to be $47,500 and will authorize the issuance of securities in that amount.

The Commission's accounting department was instructed to prepare a statement of operating revenues and operating expenses for the year 1929, four months of which were projected, and the result is as follows:

		First 8 months 1929	Projected Year
Requirements			
Operating expenses W/o depreciation	$75,891.46		
Deduct:			
Extraordinary repairs—60%	9,745.37	$66,146.09	$99,219.14
Additional taxes 1930			4,512.84
Depreciation 5% on depreciable property	$949,551.43		47,477.57
7% return on $954,005			66,780.35
Total			$217,989.90
Revenues			
Exchange service		$110,032.50	$165,048.75
Toll service		17,739.41	26,609.19
Miscellaneous operating		2,244.39	3,366.59
Nonoperating		481.72	722.58
Totals		$130,498.02	$195,747.11
Less than requirements			$22,242.79

Note: The above requirements do not include any rate case expense.

The amount of revenue projected shows requirements to be $22,242.79, and the amount of revenue to be received on the several schedules which were increased will still be less by $1,478.79 than the requirements. It will also be noted that no attorney's fee or rate expense is included.

The Commission, having heard the evidence and being fully advised in the premises, is of the opinion and finds that some additional revenue should be provided, and it will be so ordered.

It further finds that where free service now exists between petitioner's exchanges at Hanna, LaCrosse, Rolling Prairie, Union Mills, Wanatah, Westville, and Laporte, all of Indiana, the same should be revoked, set aside and in lieu thereof a toll charge of 10 cents should be established, put into effect, and collected for calls of three minutes or less duration to and from all of petitioner's exchanges, and it will be so ordered.

It further finds that in making all charges for toll service, the same amount that is authorized for the initial call should be charged for each additional five minutes' conversation or fraction thereof, and it will be so ordered.

It further finds that the monthly single line business phone rate of $5

within the corporate limits of LaPorte, Indiana, should be vacated, set aside, and held for naught, and in lieu thereof a rate of $5.50 per month should be established, and it will be so ordered.

It further finds that the single line residence rate within the corporate limits of LaPorte, Indiana, of $2.50 should be vacated, set aside, and held for naught, and in lieu thereof a rate of $3 per month should be established, and it will be so ordered.

It further finds that the four-party monthly rate of $1.50 within the corporate limits of LaPorte, Indiana, should be vacated, set aside, and held for naught, and in lieu thereof a rate of $1.85 per month should be established, and it will be so ordered.

It further finds that the balance of said rate schedule now in effect shall remain undisturbed and in force and effect until the further order of the Commission.

It further finds that petitioner, LaPorte County Indiana Telephone Company of LaPorte, Indiana, should be authorized and directed to issue and sell at not less than 90 per cent of par, three hundred shares of its 7 per cent cumulative preferred stock of the par value of $100 per share, and 200 shares of its common capital stock of the par value of $100 per share, to be sold at not less than par, or $100 per share, the proceeds received from the sale of said stock to be used in reimbursing the depreciation reserve fund of petitioner, and should any balance remain in said reserve fund, the same may be transferred to the company's treasury to reimburse said treasury for money expended therefrom as capital expenditures, and it will be so ordered.

[8] It further finds that the 4 per cent on the depreciated or book value heretofore applied each year as a depreciation reserve fund is inadequate and the same should be abrogated, set aside, and held for naught, and in lieu thereof 5 per cent of the book value, or $949,551, of petitioner's property each year should be set aside as a depreciation reserve fund, to be used in accordance with § 25 of the Acts of 1913, and for no other purpose, and it will be so ordered.

It further finds that the fair value of petitioner's property for purposes of this cause should be $954,005 and it will be so ordered.

It further finds that all prayers of the petition not specifically granted in the preceding paragraphs herein should be denied, and it will be so ordered.

It further finds that the provisions of this order should be in force and effect as of January 1, 1930, and until the further order of this Commission, and it will be so ordered.

McCardle, Chairman, Ellis and West, Commissioners, concur; Singleton, Commissioner, who heard the case, dissents; McIntosh, Commissioner, dissents.

ALABAMA PUBLIC SERVICE COMMISSION

Re Alabama Utilities Service Company
Re Tri-City Gas Company

[Docket No. 5824.]

Rates — Promotional rates — Modification to prevent public dissatisfaction.

A promotional rate, proposed by a natural gas company attempting to stimulate consumption and to distribute equally the cost of service, while approved in principle, was modified by the Commission so as to prevent any burdensome increase to a substantial number of small consumers who did not yet appreciate the justice of a strict application of the cost of service basis for rate distribution.

[February 6, 1930.]

PETITION *by two gas utilities for approval of certain gas rates; rates approved as modified.*

By the COMMISSION: The Alabama Utilities Service Company filed with the Commission for approval a schedule of rates applicable for natural gas service at Anniston, Alabama, and Tuscaloosa, Alabama, and on the same date the Tri-City Gas Company filed the same schedule of rates applicable for natural gas service at Gadsden, Alabama. The rates included in the schedules so filed are as follows:

General Gas Service Rate

Available to all consumers of the company's gas service not otherwise specifically provided for.

Rate:	Net	Gross
For the first 200 cu. ft. or less per month	$1.50	$1.60
	per 1,000 cu. ft.	
For the next 800 cu. ft. used per month	1.75	1.85
For the next 4,000 cu. ft. used per month	1.20	1.30
For all over 5,000 cu. ft. used per month	.65	.75

Commercial Gas Service (Optional)

Available to any consumer, but especially for restaurants, hotels, bakeries, etc., for space heating, commercial cooking, refrigeration, or any other use.

Rate	
Service Charge	
Per meter per month	$1.00 net
Maximum Use Charge	
For each 100 cubic feet per hour of maximum hourly rate of use per month	1.00

Consumption Charge

	Per 1,000 cu. ft. Net	Gross
For the first 5,000 cu. ft. used per mo.	$1.00	$1.10
For the next 45,000 cu. ft. used per mo.	.55	.60
For all over 50,000 cu. ft. used per mo.	.35	.40

Industrial Gas Service (Optional)

Available to any consumer using the company's gas service for industrial purposes who will guarantee a

minimum annual consumption of 600,000 cubic feet per year.

Rate

Maximum Use Charge

	Per 100 cu. ft. Net
For the first 300 cu. ft. per hour of maximum hourly rate of use—per mo.	$2.00
For all over 300 cu. ft. per hour—per mo.	1.00

Plus

Consumption Charge

	Per 1,000 cu. ft. Net	Gross
For the first 50,000 cu. ft. used per mo.	$.60	$.65
For the next 150,000 cu. ft. used per mo.	.35	.40
For all over 200,000 cu. ft. used per mo.	.30	.35

Wholesale Industrial Gas Service

Available to any consumer using the company's gas service for industrial purposes and guaranteeing an annual consumption for 10,000,000 cubic feet.

Rate

Maximum Use Charge

	Per 100 cu. ft. Net
For the first 2,000 cu. ft. of hourly maximum demand per month	$1.50
For the next 3,000 cu. ft. of hourly maximum demand per month	1.25
For all over 5,000 cu. ft. of hourly maximum demand per month	1.00

Consumption Charge

	Per 1,000 cu. ft. Net	Gross
For the first 500,000 cu. ft. used per mo.	$.34	$.36
For the next 1500,000 cu. ft. used per mo.	.28	.30
For the next 3000,000 cu. ft. used per mo.	.26	.28
For all over 5000,000 cu. ft. used per mo.	.24	.26

The first hearing on above rates was held in the city hall in Birmingham on January 17th, with officials and representatives of the three cities affected, and representatives of petitioner present. At this hearing, the petitioner offered a revised schedule for General Gas Service for Gadsden, Alabama, Anniston, Montgomery, Selma, and Tuscaloosa to be effective on the introduction of natural gas service in each community. The revised rate was as follows:

General Gas Service

Available to all consumers of the company's gas service not otherwise provided for.

Rate:	Net	Gross
For the first 200 cu. ft. or less used per mo.	$1.50	$1.60
	Per 1,000 cu. ft.	
For the next 2800 cu. ft. used per month	$1.35	$1.45
For the next 2000 cu. ft. used per month	.85	.95
For all over 5000 cu. ft. used per month	.65	.75

On request of the cities' representatives for further time in which to study the revised schedule of rates, hearing on the Anniston rates was continued to January 29, 1930, at Birmingham, and on the Gadsden and Tuscaloosa rates to January 30, 1930, at Birmingham.

At these hearings, the petitioning companies, which are both owned and controlled by the Southern Cities Public Service Company, presented testimony relative: (1) to the per cent decrease in gross revenue which would be caused by application of the rates petitioned for, (2) in a general way to the decreased production cost at Anniston and Gadsden and the increased distribution cost at all three cities occasioned by introduction of natural gas, (3) to the conditions under which the utility is purchasing the present supply of coke oven gas at Tuscaloosa, (4) to the

cost to serve gas to individual customers.

Resolutions from city council of Anniston were filed: (1) protesting raising of minimum charge to $1.50, (2) protesting adoption of any schedule of rates that would discriminate against city of Anniston in favor of other cities using this service: (3) petitioning that any rate schedule adopted require a minimum number of B. T. U. per cubic foot of gas. The city council of Gadsden filed a petition protesting the adoption of the General Gas Service schedule on the grounds that it was unjust, unfair, unreasonable, and discriminatory to the Gadsden people and asked that the present gas rate not be increased.

In addition to these resolutions, considerable date was filed by representatives from cities of Anniston and Tuscaloosa, (1) relative to the effect of the proposed general gas rate on the small consumers in each city; (2) comparisons of the proposed general gas rate with natural gas rates in other states having such service.

In addition to such documentary evidence, the mayors and representatives from the three cities affected presented oral argument which was principally an elaboration of the documentary evidence.

Mayors from the cities affected stated that the schedules filed other than for General Gas Service met their approval and no objections were made to same.

This case involves the prescribing of rate schedules for service new in Alabama. The petitioners claim this service will be greatly superior to the present manufactured gas service and will be of great benefit in the upbuilding of these cities through use of natural gas by industries. The petitioner further claims that the schedules petitioned for will work to produce these results and at the same time be equitable to all concerned. On the other hand, the consumers, through their representatives, claim rates petitioned for are unfair and base this claim partly on the effect of the rates on the small customer, and partly on comparisons of rates in other cities where natural gas is already in use. In fixing these rates, the Commission has the benefit of the past history of manufactured gas and electric rates in this state. This history convinces the Commission that the rate structures which tend to equitably distribute the cost of service inures to the benefit of the consumer as well as of the company.

We have had occasion in the past, notably in Docket No. 4465, decided October 10, 1924, 35 Ala. P. S. C. 367, P.U.R.1925A, 413; Docket No. 4810, Re Mobile Gas Co. decided February 28, 1927, 38 Ala. P. S. C. 41, and Docket No. 5193, in Alabama Pub. Service Commission v. Alabama Power Co. decided May 26, 1928, 39 Ala. P. S. C. 89; to refer to the relatively large cost of service incurred by utilities through distribution. And, as we have stated in substance in each of these cases referred to above, it is the more equitable distribution of these costs which makes necessary some form of rate which will cause the small customer to pay a charge more reasonably proportionate to the cost which he puts on the utility. Unless this is done,

it is manifest to anyone who gives the subject careful consideration that the loss incurred by the utility in furnishing these small customers service, must be reflected in a somewhat higher commodity charge paid by the average customer of the utility.

"If it were possible for all customers of gas and electric utilities to go to the manufacturing plant of the utility and carry away its product as is so frequently done in the purchase of ordinary household supplies, then there would be justification for only such differentials between the price paid by the small consumer and that paid by the large consumer as ordinarily maintains in the sale of merchandise in private business." Docket No. 5193, *supra*, at p. 97.

In the present proceeding, the petitioner has presented a schedule of rates for the three cities of Gadsden, Anniston, and Tuscaloosa, which would substantially increase the bills of the smaller consumer, render some reduction to the average consumer with a substantial reduction to the consumer using above 3,000 cubic feet of natural gas per month. The principle of such a promotional rate is sound in our opinion, yet the measure of these rates, if approved, would so increase the bills of the smaller consumer as to cause the utility to lose a number of such customers. As we said in Docket Nos. 5454, 5494, decided December 31, 1928, 39 Ala. P. S. C. 307, P.U.R.1929A, 458, 469: "Rate structures have not yet come to the point of following strictly the cost of service basis. While the tendency is in that direction, the development ought probably to be evolutionary, not revolutionary. Whether such method of rate making can, or should, ever be strictly applied in the case of such necessities as water, light, heat, and sanitation, is a very debatable question."

The schedule of rates we are hereby prescribing, in our opinion, will prove sufficiently attractive to the average and larger consumer of gas to cause a substantial increase in business to the utility from these classes, and will, at the same time, prevent any burdensome increase to a substantial number of small customers, who have not learned to appreciate that there are certain costs which the utility incurs in serving them that do not vary with the amount of gas consumed. These costs are approximately the same in rendering service to a customer using 500 cubic feet of gas as they are to a customer using 10,000 cubic feet. The Commission in prescribing rates have endeavored to give consideration to all interests.

Comparison in each city affected of domestic monthly billings for various consumptions under the present manufactured gas rates, those petitioned for, and the rate herein prescribed, are set out in detail on Exhibits "E" of this report and order, which separately show such comparison for Anniston, Tuscaloosa, and Gadsden.

The schedules filed by the company applicable to commercial and industrial service are found to be reasonable for such service.

The lower rates open up a large field of use in both domestic and industrial classes.

The amount of gas that can be

sold by the company under these schedules, and, therefore, the amount of its revenue and operating expenses cannot be definitely forecasted.

Indeed, the views of all interested parties indicate that rates prescribed in this case are, because of the circumstances, more or less experimental. For this reason, the Commission retains jurisdiction of these proceedings for the purpose of revising our present order at any time in the future, when after a reasonable period of operation, there appears substantial reason for modifying the rates now prescribed.

The revenues to be derived from application of these rates, as well as the expenses incurred in the distribution of natural gas, cannot now be definitely forecasted. The Commission finds that the application of the prescribed rates to the 1929 business in each city would not produce, after reasonable expenses, a return in excess of what is fair on the value of the property used and useful in public service.

The testimony of petitioner is to the effect that tests of the natural gas to be supplied show that generally speaking, such gas has twice the heating value of manufactured gas.

The Commission includes in these rate schedules a B.T.U. standard of heat value to apply to natural gas service.

The Commission will issue separate orders covering rates for each community to which natural gas is now available. This service is not now available to Montgomery or Selme and consideration of the application for rates to these commuities will be given by the Commission at such time as the service becomes available.

NORTH CAROLINA CORPORATION COMMISSION

Re Almond Light & Power Company

Service — Abandonment — Improper actions by consumers — Refusal of payment.

An electric utility was authorized to discontinue a section of its distribution system where a majority of the customers had refused to pay their current bills and had reconnected their service after the company had disconnected them for nonpayment.

[February 4, 1930.]

PETITION *of an electric utility to abandon certain distribution lines; granted.*

By the COMMISSION: This matter came up upon the application of the petitioner for permission to abandon certain electric distribution lines near the town of Albemarle, North Carolina.

It appears that under the former management of this company certain extensions were made to the cost of which certain contributions were made by the prospective subscribers. Since the present management has obtained control, a controversy has arisen with reference to these contributions, the subscribers claiming a verbal agreement and the original owners disputing the claim. The company has an affidavit from one of the original subscribers confirming the stand taken by the company.

A majority of the subscribers having refused to pay their current electric bills, the company has disconnected service for nonpayment and the subscribers have reconnected despite warnings to the contrary. The company, therefore, desires to sacrifice such revenue as it may now be getting from the lines in order to avoid any litigation with the claimants; therefore, it is

Ordered, that the Almond Light & Power Company be, and it is hereby, authorized to discontinue this section of its distribution system at the point where it connects with the Moss Springs Line, subject to hearing upon complaint.

DISTRICT OF COLUMBIA SUPREME COURT

Myron P. Lewis et al.

v.

Potomac Electric Power Company

[Nos. 50417, 50419, 50421, 50422, 50423.]

Service — Right to discontinue — Submetering by landlord.

An electric company has no right to refuse service to an apartment house whose owner declines to agree not to charge tenants for current resold to them on a metered basis, or else not to resell such current to his tenants at all.

[January 31, 1930.]

SUIT *by the owners of apartment houses against an electric company to compel the rendition of service; motion to dismiss overruled.*

STAFFORD, J.: The question here involved is whether the defendant has a right to refuse to furnish electricity to an apartment house owner unless the latter will engage that he will not charge his tenants for such electricity transmitted to them by him on the basis of the amount used by the tenants as ascertained by a meter, or else that the apartment house owner will

engage not to resell the electricity to his tenants. Four of the same plaintiffs brought suits in this court in which they claimed that the Commission's approval of this condition made the order of the Commission void. Those suits were treated as brought under the statute and not as an appeal to the general equity power of the court. There was a motion to dismiss the bills and the motion was sustained upon the ground that the order of the Commission was not necessarily void by reason of its approval of said condition; that such condition might be legal or illegal but that in any case the Commission had no jurisdiction over the matter of submetering by apartment house owners inasmuch as the statute in question took out of their jurisdiction the situation here presented in its definition of the term "electrical corporation." The section reads in part:

". . . except where electricity is made, generated, produced, or transmitted by a private person or private corporation on or through private property solely for its own use or the use of tenants of its building and not for sale to or for the use of others."

The decision was that this language showed a plain legislative intent to allow apartment house owners to receive electricity from the power company and transmit it for the use of its tenants and to charge its tenants therefor. This question having been determined by the prior decision the sole question would seem to be whether in thus charging the tenants for the electricity bought by the apartment house owner and by him transmitted to them the amount of such charge may be ascertained by the use of a meter so that each tenant may be charged for what he actually uses instead of being charged a lump sum by way of increased rent or without any reference to the amount used by the particular tenant. The court is unable to see any reason or legal basis for such a distinction, nor upon what ground the power company can refuse to furnish the electricity to the apartment house owner unless he will comply with such a condition.

For these reasons the motion to dismiss will be overruled.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Illinois Bell Telephone Company

v.

Pat H. Moynihan et al.

(— F. (2d) —.)

***Intercorporate relations** — Separate corporate entities — Stock ownership.*

1. The fact that a nation-wide holding company owns 99 per cent of the

stock of a state-wide subsidiary telephone company does not have the effect of destroying the corporate entity of the state company, in the absence of any evidence to overthrow the presumption that the directors have performed their official duties honestly and have acted in good faith with respect to the corporation and to the public, p. 152.

Intercorporate relations — Disregard of corporate fiction — Estoppel.

2. The Commission may not disregard the separate corporate entity of a parent company owning 99 per cent of the stock of a local telephone company for the purposes of defending the reasonableness of its order, where it has treated the local company as a separate corporate entity for the purpose of compelling it to establish rates, p. 153.

Intercorporate relations — Evidence of corporate control — Benefits.

3. The contention that a parent company owning 99 per cent of the stock of a local telephone subsidiary so dominated and controlled the officers of the latter as to reduce it to a mere agency or instrumentality of the parent was held not to be sustained where the evidence showed co-ordination of activities of both organizations with a view to producing an efficient, unified service, p. 153.

Intercorporate relations — Contract between parent and subsidiary.

4. Agreements made by a local telephone subsidiary with its parent holding company, although to be scrutinized carefully so far as they affect the question of confiscation, are not to be rejected or supplanted in the absence of any evidence of bad faith on the part of the contracting parties, p. 155.

Apportionment — Telephone properties — Interstate service — Board-to-board basis.

5. The method followed by a telephone company in allocating property to interstate service, for rate-making purposes, on the basis of the use made of its facilities from the toll switchboard in interstate commerce, while allocating all properties from the subscriber's station to the toll trunk to intrastate service, was approved as reasonable, where the opposition adopted a purely negative attitude and offered no affirmative evidence to support any different method of apportionment, p. 156.

Intercorporate relations — Division of tolls — Telephone companies.

6. A division of telephone tolls between a long distance parent company and its local operating subsidiary whereby the local company retained from 45 to 49 per cent of the total gross of the originating long distance tolls, and earned 12.64 per cent on the book cost of its interstate toll property was held to be fair and reasonable, especially where the return to the local company on its entire exchange properties was only 5.74 per cent of the book cost, p. 157.

Return — Amount as a whole — Confiscation — Intrastate property.

7. The court determined an issue of confiscation claimed by a telephone company on the basis of the property allocated to one city where such basis was less favorable to the utility's claims than that of its total intrastate property or its intrastate exchange property, p. 158.

Return — Payment to affiliated company — Estoppel.

8. A telephone subsidiary, in accepting for a time a rate order of the Commission which refused to give full force to a contract between the local company and its parent calling for a payment of a percentage of its gross receipts in return for certain services, was held not to be estopped in a

subsequent proceeding attacking the order as confiscatory from claiming the full amount called for in the contract as a proper operating expense, p. 159.

Valuation — Property paid for out of depreciation reserve.

9. The exclusion by the Commission from a telephone company's rate base of the value of extensions and additions paid for from the depreciation reserve was held to be clearly erroneous, especially where the Commission had also reduced the company's allowance for depreciation, p. 161.

Evidence — Presumption favoring Commission order — Overcoming.

10. The action of the Commission in excluding from the rate base of a telephone utility the value of certain additions paid for from the depreciation reserve, while at the same time reducing the utility's annual allowance for depreciation, was held to be so inconsistent as to destroy any presumption favoring the Commission's findings, p. 161.

Return — Purchases from affiliated company — Telephone equipment.

11. A contention that exorbitant prices were paid by a local telephone utility to an affiliated electric manufacturing company for purchases forming part of the plant account of the former was held unsustained by the evidence where the average profit of the manufacturing company for the preceding fourteen years was less than 7 per cent, p. 161.

Valuation — Going value — Confiscation proceedings.

12. It was held unnecessary in determining an issue of confiscation raised by a telephone utility to restrain enforcement of a Commission order for the court to do more than to find the amount allowed by the Commission for going value to be the minimum allowance possible, p. 161.

Return — Percentage allowed — Telephones.

13. A rate order of a state Commission is confiscatory if, after resolving all possible disputed questions in favor of the order, the return is less than 5½ per cent of the fair value of the property involved, p. 161.

[January 31, 1930.]

BILL *in equity by a telephone utility to enjoin the enforcement of a rate order of the Illinois Public Utilities Commission (predecessor of the Commerce Commission); temporary injunction made permanent.*

By the COURT: The bill in this case, filed September 20, 1923, seeks to enjoin, on grounds of confiscation, rates for telephone service prescribed in an order of the Illinois Commerce Commission made on August 16, 1923, P.U.R.1924A, 213, and effective October 1, 1923.

The rates now charged are those fixed by the Public Utilities Commission (the predecessor of the Commerce Commission) by order of December 20, 1920, 8 Ann. Rep. Ill. P. U. C. 372. The Commerce Commission instituted proceedings against the plaintiff on September 13, 1921, and by the order here attached, reduced the rates for four classes of coin box service.

The bill alleges that some of the company's property was arbitrarily disregarded in making the valuation,

that the valuation is too low, and that certain expenses were improperly rejected. The Commission and the city of Chicago, which was permitted to intervene as a defendant, answered the bill. Application for a temporary injunction was made. This was granted on December 21, 1923, after a hearing on affidavits, in which the disputed points were covered at length on both sides. The injunctional order recites that the affidavits are conflicting, that the court is of the opinion that the preliminary injunction should issue because the rates are confiscatory, that the whole matter should go to a final hearing upon evidence to be adduced before the court and not merely upon affidavits, that the court is prepared to set the case down for immediate trial, that a final disposition of the suit on its merits can be made within a few weeks, and, that pending such final hearing, a preliminary injunction should be granted.

The defendants did not avail themselves of the offer of an immediate trial tendered by the court, but elected to appeal to the Supreme Court from the order granting the temporary injunction. That order was affirmed in a memorandum opinion October 19, 1925 (Smith v. Illinois Bell Teleph. Co. (1925) 269 U. S. 531, 70 L. ed. 397, 46 Sup. Ct. Rep. 22). Plaintiff then moved for a permanent injunction on the pleadings. That motion was denied, the reasons for the ruling being stated in the memorandum filed July 1, 1927.

The order granting the temporary injunction required plaintiff to enter into an undertaking that it will refund to its subscribers the amounts paid by them in excess of the sums chargeable under the order of August 16, 1923, *supra*. The amounts so reserved for refunds up to January 1, 1929, were as follows: $427,289 for the last quarter of 1923; $1,719,624 for 1924; $1,765,444 for 1925; $1,774,492 for 1926; $1,793,918 for 1927; $1,812,746 for 1928. The exact sum for 1929 is not in the record, but almost two million dollars more has been added to the amount which has been accumulated in the reservation for refunds, the entire amount of such reservation being now more than eleven million dollars.

Delay in bringing the case to trial is attributable to the city. The company has been ready at all times to proceed. Postponements were sought repeatedly by the city on the ground of change of counsel, lack of preparation and inability to procure money with which to employ experts. Finally there was a peremptory setting of the case for trial on April 15, 1929. By agreement the evidence was taken before one of the judges. Hearings were held during a period of approximately two months and a record made consisting of 3,000 pages of testimony and 281 exhibits.

We consider first the city's attack upon the standing of the Illinois company as the real plaintiff in the case. Ninety-nine per cent of the stock of the Illinois Company is owned by the American Telephone & Telegraph Company, which owns also substantially the same proportion of the stock of the Western Electric Company. The Illinois and American Companies unite in rendering long distance service under an arrangement for division of tolls. At the time of this in-

quiry, October 1, 1923, there was in effect an agreement by which the Illinois Company paid to the American Company 4½ per cent of its gross revenues for rent of instruments and as compensation for engineering, executive, financial, and other services. A large part of the materials entering into the construction of the plant and equipment of the Illinois Company were purchased from the Western Electric Company and much of its operating expense consisted of payments made under a contract with that company for apparatus and supplies.

The American Company, at the time in question, owned a controlling interest in 15 telephone companies which, in connection with other companies controlled by those subsidiaries and some companies in which its interest was not controlling, were and now are operated as a system with the avowed purpose of rendering a nation-wide and unified telephone service. "The Associated Companies," the American Company says, "are specialists in local service problems, with local operating forces identified and familiar with the needs of the communities they serve. The parent company undertakes the solution of the problems that are common to all." In this way, it is said there is provided a central authority equipped to perform adequately general functions, leaving to the local companies responsibility for local affairs.

[1] The city urges that, in bringing about this unified service, the American Company has exercised its control in such a way as to destroy the corporate identity of the Illinois Company with the result that either the suit must fail for lack of the real plaintiff or, if permitted to stand, must be tried as if the American Company were the party before the court. "The Illinois Company," it is said, "is a mere agency or instrumentality of the American Company." The stock ownership gives to the American Company power to control the Illinois Company through the election of directors. This power, in itself, however, does not make the American Company the one which is operating the local public utility. It does not have the effect of destroying the separate corporate identity of the local company. The stock ownership does not give authority to dictate the acts of the directors of the local company; and, against accusations of fraud and misconduct, it will be presumed that the directors have performed their official duties honestly and have acted in good faith with respect to the corporation of whose affairs they are in charge and the public to which it gives service. (Pullman Palace Car Co. v. Missouri P. R. Co. (1885) 115 U. S. 587, 596, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; Porter v. Pittsburg Bessemer Steel Co. (1887) 120 U. S. 649, 670, 30 L. ed. 830, 7 Sup. Ct. Rep. 741; Peterson v. Chicago, R. I. & P. R. Co. (1907) 205 U. S. 364, 383, 51 L. ed. 841, 27 Sup. Ct. Rep. 513; Houston v. Southwestern Bell Teleph. Co. (1922) 259 U. S. 318, 66 L. ed. 961, P.U.R.1922D, 793, 42 Sup. Ct. Rep. 486; Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission (1923) 262 U. S. 276, 289, 67 L. ed. 981, P.U.R.1923C, 193, 43 Sup. Ct. Rep.

544, 31 A.L.R. 807; Indiana Bell Teleph. Co. v. Public Service Commission (1924) 300 Fed. 190, 204, P.U.R.1925A, 363; Northwestern Bell Teleph. Co. v. Spillman (1925) 6 F. (2d) 663, P.U.R.1926A, 330).

Courts, of course, will look through form to substance. Where the power of stock ownership is so exercised as to commingle the affairs of the corporations and make them practically one, courts will not permit themselves "to be blinded or deceived by mere forms of law, but, regardless of fiction, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require." (United States v. Delaware & H. Co. (1909) 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; Chicago, M. & St. P. R. Co. v. Minneapolis Civic & Commerce Asso. (1918) 247 U. S. 490, 62 L. ed. 1229, 38 Sup. Ct. Rep. 553).

[2] It must not be overlooked that the order of the Commission here involved is directed against the Illinois Company. The Commission did not find that the corporate identity of the Illinois Company had been destroyed. It was treated as a corporation for the purpose of compelling it to establish the prescribed rates for service furnished by the operation of the property to which it has the legal title. It is not a fair application of the rule invoked by the city to say that the order of the Commission may be enforced against the Illinois Company, as a corporate entity, and that the company then loses its corporate character when it attempts to show that the Commission's order is confiscatory. Moreover, the Commission, in establishing the rates complained against, did not deal with the business of the Illinois Company as an integral part of the business of the American Company. The city maintains that the question to be determined is "What is a fair return to the investors who have placed their investment in the American Telephone & Telegraph Company, the real operator of the Chicago property in so far as the local property and the local use is concerned?" The Commission did not proceed on that theory. The Commission did not make an investigation of the business of the American Company for the purpose of fixing rates for that company. If the position now taken by the city is correct, the method pursued by the Commission is fundamentally erroneous and its order is void. (Northern P. R. Co. v. Department of Public Works (1925) 268 U. S. 39, 43, 69 L. ed. 837, P.U.R.1925D, 93, 45 Sup. Ct. Rep. 412; Chicago, M. & St. P. R. Co. v. Public Utilities Commission (1927) 274 U. S. 344, 351, 71 L. ed. 1085, P.U.R.1927D, 340, 47 Sup. Ct. Rep. 604.)

[3] The city's contention that the American Company has abused its power of stock ownership and has dominated and controlled the officers and directors of the Illinois Company with the result that they exercise no will of their own and the Illinois Company is reduced to a mere agency or instrumentality of the American Company is not sustained by the evidence. This evidence includes the Annual Reports of the American Company from 1881 to date, a selection of bulletins, circulars, and let-

ters sent by the general staff of the American Company and some oral testimony as to alleged instances of dictation. The evidence shows a coordination of activities with a view to producing an efficient, unified service. The plan of organization, the ownership of property, and the method of operation show that the American and Illinois Companies functioned in distinct fields of activity. At no time have more than three of the eleven directors of the Illinois Company been officers of the American Company. The charges of neglect of duty and breach of trust against the directors necessarily implied in the assertion that the Illinois Company has lost its corporate identity are unsustained by proof. We do not find anything in the long record on this branch of the case which furnishes a sufficient reason for departing from the general rule applicable to transactions between companies related through stock ownership as are the American and Illinois Companies. That rule is stated by the Supreme Court in a case (Houston v. Southwestern Bell Teleph. Co. *supra*, at p. 798 of P.U.R.1922D,) involving the American Company, the Western Electric Company and the Southwestern Bell Telephone Company, another subsidiary of the American Company, as follows:

"The American Telephone & Telegraph Company owns substantially all of the stock of the Company and a large majority of the stock of the Western Electric Company. From the American Telephone & Telegraph Company the company leases its instruments and secures their maintenance and renewal and from the Western Electric Company it obtains the greater part of its equipment and supplies used in operating its local exchange. It is contended by the city that no fair disclosure was made of the profits made by the furnishing companies on the instruments and on the material and supplies so furnished and that, for this unique reason, the company should not be heard in a court of equity and the case should be dismissed. It is true that the company did not introduce proof to show what the profits of the two companies were, either upon the business done with it or on their entire business, but it did introduce much evidence tending to show that the charge made and allowed for the services rendered and supplies furnished by them was reasonable and less than the same could be obtained for from other sources. Under the circumstances disclosed in the evidence, the fact that the American Telephone & Telegraph Company controlled the Company and the Western Electric Company by stock ownership is not important beyond requiring close scrutiny of their dealings to prevent imposition upon the community served by the Company."

And in United Fuel Gas Co. v. Railroad Commission (1929) 278 U. S. 300, 320 321, 73 L. ed. 390, P.U.R.1929A, 433, 448, 49 Sup. Ct. Rep. 150, it is said:

"We need not labor the point that a public service corporation may not make a rate confiscatory by reducing its net earnings through the device of a contract unduly favoring a subsidiary or a corporation owned by its own stockholders. Cf. Chicago & G. T. R. Co. v. Wellman (1892) 143

U. S. 339, 345, 36 L. ed. 170, 12 Sup. Ct. Rep. 400. We recognize that a Public Service Commission, under the guise of establishing a fair rate, may not usurp the functions of the company's directors and in every case substitute its judgment for theirs as to the propriety of contracts entered into by the utility; and common ownership is not of itself sufficient ground for disregarding such intercorporate agreements when it appears that, although an affiliated corporation may be receiving the larger share of the profits, the regulated company is still receiving substantial benefits from the contract and probably could not have secured better terms elsewhere. (Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission (1923) 262 U. S. 276, 288, 67 L. ed. 981, P.U.R.1923C, 193, 43 Sup. Ct. Rep. 544, 31 A.L.R. 807; Houston v. Southwestern Bell Teleph. Co. (1922) 259 U. S. 318, 66 L. ed. 961, P.U.R.1922D, 793, 42 Sup. Ct. Rep. 486."

[4] The Illinois Company is to be treated as the real plaintiff in this case. While agreements with the American Company, so far as they affect the question of confiscation, are to be scrutinized carefully, they are not to be rejected as shams; nor may findings of the Commission as to what would be fair and reasonable contracts be substituted for them unless it appears they were made in bad faith and as a device for unduly enhancing the earnings of the American Company at the expense of the Illinois Company.

Another preliminary question which should be disposed of before passing to questions of earnings and value relates to the separation of plaintiff's interstate property, revenue and expenses and the division of long distance tolls with the American property.

The property of plaintiff in Chicago is used to render (a) exchange service all of which is intrastate; (b) intrastate toll service over its own lines and under arrangements with other companies than the American; (c) interstate toll service, which includes all the toll service rendered under arrangements with the American Company. The Commission in making the order complained against dealt with plaintiff's Chicago property and business as an entirety. No separation of interstate property and business was made by the company, and the Commission's order which covered exchange service in Chicago was based upon a valuation of all of plaintiff's Chicago property and a consideration of its total Chicago revenues and expenses.

The Illinois Company owns and operates all the property in the city of Chicago used in interstate calls, and connects with the property owned by the American Company at the City limits of Chicago. This part of the business of the Illinois Company is interstate commerce. (Public Utilities Commission v. Attleboro Steam & Electric Co. (1927) 273 U. S. 83, 71 L. ed. 549, P.U.R.1927B, 348, 47 Sup. Ct. Rep. 294; South Covington & C. Street R. Co. v. Covington (1915) 235 U. S. 537, 59 L. ed. 350, P.U.R.1915A, 231, 35 Sup. Ct. Rep. 158, L.R.A.1915F, 792.)

Following the rule stated in the Minnesota Rate Cases (1913) (230

U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. Rep. 729, 48 L.R.A.(N.S.) 1151, Ann. Cas. 1916A, 18) plaintiff, which is attacking as confiscatory the order of a State Commission, has made a showing not only upon the basis stated in the Commission's order but upon the basis of intrastate business alone. As the Commission's order dealt directly with exchange rates only, plaintiff has also made a showing as of June 30, 1923, in which all toll business both interstate and intrastate is eliminated. The accuracy of these computations can not be questioned, if the principles on which they are made are correct. They show a larger rate of return upon the property used when all the business is considered than is shown when either the interstate or the entire toll business is eliminated. The case, therefore, is presented in its least favorable aspect as to plaintiff's claim of confiscation by following the method adopted by the Commission and making no separation of toll business, either interstate or intrastate. According to these computations ½ of 1 per cent of calls originated by subscribers resulted in interstate toll calls, 3.62 per cent of plaintiff's property in Chicago was used in furnishing interstate toll service, and 2.54 per cent of its property was used in furnishing intrastate toll service. The per cent of return at the rates now in force shown on plaintiff's claimed reproduction cost new was 4.32 per cent for total Chicago business, 4.15 per cent for total intrastate business, and 3.97 per cent for intrastate exchange business. The per cent of return shown on plaintiff's claimed original cost was 6.23 per cent for total Chicago business, 5.99 per cent for total intrastate business and 5.74 per cent for intrastate exchange business. The difference, therefore, assuming the correctness of plaintiff's method, will not affect the result and may be diregarded for the purposes of this case.

[5] The defendants claim, however, that the basis of separation was erroneous and did not include a sufficient amount of the company's property as used in interstate commerce. They assert that in the proportion assigned to the interstate use there should be included an item covering the use of the exchange property, that is to say the use of that property from the subscriber's station to the toll board. The method employed by the company was upon the basis of use from the toll switchboard and no portion of the property from the subscriber's station to the toll trunks was considered as interstate commerce. Defendants have neither shown nor stated the amount to be added on account of the alleged interstate use of exchange property, but that it can not affect the result in this case will be evident hereafter, if it is borne in mind that, as above stated, only ½ of 1 per cent of calls originated by subscribers resulted in interstate calls.

The separation of interstate from intrastate business is a difficult problem which the courts recognize and do not require exactness of proof. A separation made upon a reasonable basis will be approved and this is particularly true where those opposing it adopt a purely negative attitude and offer no affirmative evidence. (Rowland v. Boyle (1917) 244 U. S. 106, 61 L. ed. 1022, P.U.R.1917E, 685,

37 Sup. Ct. Rep. 577; Groesbeck v. Duluth, S. S. & A. R. Co. (1919) 250 U. S. 607, 63 L. ed. 1167, P.U.R. 1920A, 177, 40 Sup. Ct. Rep. 38; Boyle v. St. Louis & S. F. R. Co. (1915) 222 Fed. 539, P.U.R.1916A, 49; Southern Bell Teleph. & Teleg. Co. v. Railroad Commission (1925) 5 F. (2d) 77, P.U.R.1926A, 6; Queens Borough Gas & E. Co. v. Prendergast (1928) 31 F. (2d) 339, 371, P.U.R.1928E, 791; New York Teleph. Co. v. Prendergast (1929) 36 F. (2d) 54, P.U.R.1930B, 33.)

The toll rates filed by the company provided:

"The service covered by these tariffs consists in furnishing for the use of patrons facilities, other than exchange facilities, intended for use in telephonic communication between the points listed. The exchange facilities used in connection with this service are the facilities required to establish connection between an exchange station and the toll board, or between an exchange station and the toll trunks, when such trunks are employed to effect connection with the toll board, and the use of such facilities is covered by the charges for exchange service."

This provision in the schedules and the method followed by the company in making the separation are in accord with the rulings of the courts and Commissions which have considered this subject. (Re Rock County Farmers Teleph. Co. (Wis. 1924) P.U.R.1925A, 178; Public Utilities Commission v. New England Teleph. & Teleg. Co. (R. I. 1925) P.U.R. 1926C, 207, 261; Pacific Teleph. & Teleg. Co. v. Whitcomb (1926) 12 F. (2d) 279, P.U.R.1926D, 815; New York Teleph. Co. v. Prendergast (1924) 300 Fed. 822, 826, 827, P.U.R.1925A, 491, and same case on final hearing, *supra.*) In Houston v. Southwestern Bell Teleph. Co. (1922) 259 U. S. 318, 323, 66 L. ed. 961, P.U.R.1922D, 793, 42 Sup. Ct. Rep. 486, the Supreme Court considered the partial separation of the interstate property, but an examination of the facts of that case shows that it does not sustain defendants' theory of including exchange property as interstate property.

The method followed by the Illinois Company in making a separation of its interstate property is a reasonable one and is approved.

[6] Defendants attack the fairness of the division of interstate tolls between the American and Illinois Companies. If the interstate business of the Illinois Company is excluded in determining the issue of confiscation, it is not necessary, obviously, to consider the question of the division of interstate tolls. If the issue of confiscation is to be determined upon a consideration of the entire Chicago business of the Illinois Company we should examine the objections made to the division of interstate tolls. Those tolls were divided under an arrangement by which the American Company paid an originating commission of 17 cents per message and in addition thereto the actual cost of operation of the toll switchboard and the toll lines plus 10 per cent for overhead and a 10 per cent return on the book cost thereof. All these payments resulted in the Illinois Company retaining from 45 to 49 per cent of the total gross of the originating long distance tolls. The originating

commission of 17 cents was a greater commission than that paid by the Illinois Company to the several hundred independent companies with which it connects in the state of Illinois. The originating commission for the year 1923 was $363,000. As a result of this arrangement the Illinois Company was earning 12.64 per cent on the book cost of its interstate toll property, while on the return on its exchange property was only 5.74 per cent on book cost. This division of the tolls appears to be fair and reasonable. There is no proof of abuse of discretion or fraud in making it. The sinister inference which the city seeks to have drawn from certain changes in the arrangement is not warranted by the facts. A close scrutiny of the arrangement does not disclose any reason why it should be rejected in determining the revenues of the Illinois Company or why the company should be charged with additional earnings on the theory that the division was unfair and more should have been collected from the American Company than was, in fact, received. (Chesapeake & P. Teleph. Co. v. Whitman (1925) 3 F. (2d) 938, 957, P.U.R.1925D, 407.)

[7] We determine, therefore, the issue of confiscation on the basis of the total Chicago property of plaintiff. We do this for the reason that, as pointed out above, that basis is less favorable to the plaintiff than that of its total intrastate property or its intrastate exchange property. The Commission proceeded on the basis of total Chicago property and it will be more convenient to examine the order without recasting the figures to make allowances for interstate or intrastate toll property and earnings which cannot affect the result.

We consider first the questions relating to revenues and expenses and then those relating to value.

The company's showing of revenues and expenses for 1923 is as follows:

	Actual First Seven Months 1923	(a) Computed on an Annual Basis at Actual Rate of First Seven Months 1923	Actual Year 1923
Exchange revenues	$21,102,900	$36,176,400	$36,342,226
Toll revenues	1,699,882	2,914,084	3,042,994
Miscellaneous operating revenues	370,725	635,528	673,049
Non-operating revenues	337,106	577,896	760,966
Gross revenues	$23,510,613	$40,303,908	$40,819,235
Less: Licensee revenue—Dr.	1,008,958	1,729,643	1,724,251
Total revenues	$22,501,655	$38,574,265	$39,094,984
Traffic expenses	7,609,294	13,044,504	13,192,673
Commercial expenses	2,405,983	4,124,542	4,202,273
General and miscellaneous expenses	684,105	1,172,751	1,063,194
Current maintenance	3,273,440	5,611,613	5,901,733
Depreciation	2,495,127	4,277,360	4,480,954
Taxes	2,182,187	3,740,892	3,670,347
Other expenses and deductions	195,179	334,592	303,980
Total expenses	$18,845,315	$32,306,254	$32,815,154
Balance available for return	$3,656,340	$6,268,011	$6,279,830

We have already considered the claim of defendants that the item for toll revenues should be increased because the division of tolls with the American Company is unfair. This item was accepted by the Commission in the order complained against. The Commission said:

"The record shows that the 17 cents commission was determined in 1910 from a study made at that time of the cost of performing service. Since that date the cost of operation and cost of plant has increased, and the record also shows that both the American Company and the Chicago Company have increased their telephone rates to a considerable extent within this period of time. The Commission believes that this matter should be fully investigated and an equitable adjustment made to the end that a greater part of the toll charges be paid to the Illinois Bell Telephone Company. There are not sufficient facts in this record to permit of making a proper adjustment and in this order the Commission will estimate revenues from such source on the basis now in effect." (P.U.R.1924A, 213, 242.)

Divisions of rates are primarily a matter for the consideration of the Interstate Commerce Commission and the State Commission. We find no valid reason in the record before us for modifying the item of toll revenues.

[8] The deduction on account of licensee revenue paid to the American Company is attacked by defendants on the ground of unfairness of the 4½ per cent contract. That contract provided for a payment of 4½ per cent of plaintiff's gross revenue for rental of telephone instruments and for advice and assistance in engineering, operating, financial, and other matters and for the prosecution of experimental and research work in telephony for the benefit of the entire system.

The order of the Public Utilities Commission made December 20, 1920, 8 Ann. Rep. Ill. P. U. C. 372, 385, which fixed the rates charged in 1923 and still in force under the temporary injunction limited the amount to be charged as an operating expense under this contract. The order of the Commission provided that an allowance of $1.13 was reasonable solely for the use of each telephone instrument; that the license to use patented devices, together with engineering, financial, and advisory services were of value to the Illinois Company; that the payment made under the license contract then averaged $2.10 per station per annum for the city of Chicago; and that inasmuch as the American Company owned 98 per cent of the stock of the Illinois Company, it was necessary that the underlying contract be given strict scrutiny, notwithstanding the fact that the local company, as a legal entity, was a free agent. It was further held that the evidence disclosed the unquestioned value of the contract; that, while it was difficult, if not impossible, to evaluate such services, it was to be assumed that the executive officers of the Illinois Company had taken into consideration the probable expense that would have been incurred in making any equally satisfactory alternative arrangement; that a similar payment by the Central Union Telephone Company had been sustained in

the Illinois courts; that the making of the contract was a matter of financial arrangement; that the Commission was not the financial manager of the corporation and could not ignore items charged by the utility as operating expenses unless there was an abuse of discretion by the corporate officers (citing Springfield Gas Case (1919) 291 Ill. 209, 234, P.U.R. 1920C, 640, 125 N. E. 891). It was there stated:

"Criticism as to the method of payment, insofar as it is dependent upon a percentage of the gross revenues might be sustained owing to the increase in the annual payment when gross revenues are for any reason increased. The particular amounts involved have been approved as items of operating expense in different jurisdictions by nine Commissions within the last three years, however, and the Commission . . . finds that the present annual payment under the license contract, limited to $2.10 per station per annum for the city of Chicago . . . is not excessive and may be allowed as an item of operating expense."

The Commerce Commission in the order complained against, after reciting the facts as to the relationship between the two companies stated that the services rendered under the license contract and the cost thereof should be fully investigated at some time to the end that charges for services may be fully established. The order then provided:

"The present record does not contain sufficient information to warrant this Commission in departing from the findings of the previous Commission. . . . The previous Commission found that payment . . . of $2.10 per station was sufficient to cover the value of the services rendered." (P.U.R.1924A, 213, 243.)

Plaintiff put in force the rates prescribed by the order of June 20, 1920. Those rates may have been nonconfiscatory at that time by reason of other findings as to valuation and operating expenses even though the attempt to limit payment under the license contract may have been erroneous. Plaintiff, by accepting those rates, did not estop itself from claiming as a proper operating expense, when attacking as confiscatory the subsequent order of the Commerce Commission, the full amount paid under the license contract. (See opinion of this court denying plaintiff's motion for judgment on the pleadings.)

The amount paid under the license contract was $1,724,251, of which approximately $850,000 represented services and the balance rentals. The record here does not warrant any reduction of the amount found reasonable by both Commissions for rentals. The case for the allowance of the entire amount for services is a strong one. We have already found that the record does not show an abuse of the power of stock ownership which operates to destroy the corporate identity of plaintiff. The stock ownership is not important beyond requiring close scrutiny of the contract. It is not incumbent on plaintiff to show the cost of the services to the American Company. The test is the nature of the benefits received by plaintiff and whether or not it probably could have secured better terms elsewhere. (Houston v. Southwestern Bell

Teleph. Co. (1922) 259 U. S. 318, 66 L. ed. 961, P.U.R.1922D, 793, 42 Sup. Ct. Rep. 486; Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission (1923) 262 U. S. 276, 67 L. ed. 981, P.U.R. 1923C, 193, 43 Sup. Ct. Rep. 544, 31 A.L.R. 807; United Fuel Gas Co. v. Railroad Commission (1929) 278 U. S. 300, 73 L. ed. 390, P.U.R.1929A, 433, 49 Sup. Ct. Rep. 150; Indiana Bell Teleph. Co. v. Public Service Commission (1924) 300 Fed. 190, P.U.R.1925A, 363; Northwestern Bell Teleph. Co. v. Spillman (1925) 6 F. (2d) 663, P.U.R.1926A, 330.)

The reduction which must be made if the finding of the Commission as to the license contract is followed is $360,000. The reduction of operating expenses and consequent increase in amount available for return by that amount cannot possibly change the result, in view of our rulings on other branches of the case.

The position of the city that either the entire $850,000 paid for service under the contract should be rejected or that it should be reduced by an amount larger than that stated by the Commission is untenable on this record. Accordingly, in determining the issue of confiscation, we shall make the allowance of $1,364,000 found reasonable by the Commission for operating expense on account of payments under the license contract.

Defendants urge that the charge of $4,480,954 by plaintiff for expense of depreciation is excessive by $1,800,000 as claimed by the Commission, or $2,200,000 as claimed by the city. That question will be considered in connection with the questions presented as to the valuation of the property. Some other objections are made by the city to expense items but we do not regard any of them as substantial or important.

With the exception of the expense of depreciation, reserved for consideration with valuation questions, and the deduction of $360,000 from the payment under the license contract, plaintiff's statement of revenues and expenses for 1923 is found to be substantially correct.

[**9–13**] The findings of the Commission as to valuation and expense of depreciation are as follows:

"The original cost as of December 21, 1922, of the property used and useful in the rendering of telephone service in the city of Chicago and exclusive of working capital, materials and supplies, work in progress, and going value, but including overhead is $90,687,816.

"The reproduction cost new of the property used and useful in the rendering of telephone service in the city of Chicago, exclusive of working capital, materials and supplies, work in progress and going value, but including overhead as of December 31, 1922, is $128,769,000.

"The property as it now exists is in at least 90 per cent condition.

"The amount of construction work in progress that will eventually be included in capital account is not more than $4,250,000.

"The amount necessary to provide a sufficient cash working capital and permit of carrying sufficient materials and supplies for the efficient conduct of telephone business in the city of Chicago, is $3,000,000.

"The going value of the Chicago

property of the Illinois Bell Telephone Company is $4,196,872.

"The Chicago division of the Illinois Bell Telephone Company has a depreciation reserve of $26,000,000, all of which has been contributed by the subscribers of this company, which sum has been used by the said company for extensions and additions to its property, and that the extensions and additions paid for from such moneys should not be considered in arriving at a base upon which to compute rates for telephone service.

"The fair rate-making base for the Chicago property of the Illinois Bell Telephone Company, including physical property, overheads, working capital, going value and work in progress, as hereinabove found is $96,000,000 and is exclusive of the $26,000,000 of money taken by the company for depreciation reserve and put in plant and equipment. . . .

"A fair allowance to take care of maintenance and retirement charges for said property in use as of December 31, 1922, is $7,869,400, and that sum plus 8¾ per cent of all additions and betterments will be sufficient and adequate to permit the Illinois Bell Telephone Company to properly maintain its Chicago property." (P.U.R.1924A, 213, 247, 248.)

Defendants invoke in support of these findings the rule that the burden is on plaintiff in a confiscation case to show legal inadequacy by clear and convincing evidence and that there is a strong presumption in favor of the legal adequacy of the Commission's order. (United Fuel Gas Co. v. Railroad Commission, *supra;* Darnell v. Edwards (1917) 244 U. S. 564, 569, 61 L. ed. 1317, P.U.R.1917F, 64, 37 Sup. Ct. Rep. 701.)

The exclusion from the rate base of extensions and additions to the amount of $26,000,000 paid for from the depreciation reserve was clearly erroneous. The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time it is being used for the public service. Constitutional protection against confiscation does not depend on the source of the money used to purchase the property. It is enough that it is used to render the service. The customers are entitled to demand service and the company must comply. The company is entitled to just compensation and, to have the service, the customers must pay for it. The relation between the company and its customers is not that of partners, agent and principal, or trustee and beneficiary. The revenue paid by the customers for service belongs to the company. The amount, if any, remaining after paying taxes and operating expenses, including the expenses of depreciation, is the company's compensation for the use of its property. If there is no return or if the amount is less than a reasonable return, the company must bear the loss. Past losses can not be used to enhance the value of the property or to support a claim that rates for the future are confiscatory. And the law does not require the Company to give up for the benefit of future subscribers any part of the accumulations for past operations. Profits of the past can not be used to sustain confiscatory rates for the future. Customers pay for service, not for the

property used to render it. Their payments are not contributions to depreciation or other operating expenses or to the capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock. (Public Utility Comrs. v. New York Teleph. Co. (1926) 271 U. S. 23, 31, 32, 70 L. ed. 808, P.U.R.1926C, 740, 46 Sup. Ct. Rep. 363.)

The Commission in defense of its order now asserts that the deduction of $26,000,000 was proper as representing the deduction to be made on account of depreciation in valuing the property, despite the fact the order specifically finds that the property was in 90 per cent condition. But if the basis on which the $26,000,000 was accumulated is the correct basis for measuring depreciation, then the order is clearly erroneous in reducing by $1,800,000 the allowance for expense of depreciation. It is inconceivable on any theory consistent with equity and fair dealing that both acts of the Commission can be right. If, indeed, the unreasonable and arbitrary method of the Commission in handling depreciation and property paid for out of the reserve does not make its order void. (Northern P. R. Co. v. Department of Public Works (1925) 268 U. S. 39, 69 L. ed. 837, P.U.R.1925D, 93, 45 Sup. Ct. Rep. 412; Chicago, M. & St. P. R. Co. v. Public Utilities Commission (1927) 274 U. S. 344, 71 L. ed. 1085, P.U.R.1927D, 340, 47 Sup. Ct. Rep. 604. Compare United Fuel Gas Co. v. Railroad Commission (1929) 278 U. S. 300, 73 L. ed. 390, P.U.R. 1929A, 433, 49 Sup. Ct. Rep. 150), it certainly operates to destroy any presumption which may have existed in its favor.

As to original cost, the company and the Commission agree that the original cost as of June 30, 1923, was $101,626,014. This is the Commission's finding of cost as of December 31, 1922, plus net additions to June 30, 1923. The city claims that the plant account upon which the Commission made its finding was inflated and that there is no proper basis in the record for determining original cost. A large part of purchases entering into plant account were made from the Western Electric Company. The city has failed to support its contention that exorbitant prices were paid to the Western Electric Company. It appears that the average profit for the last fourteen years of the Western Electric Company on its total business has not been in excess of 7 per cent and never above 10 per cent. The evidence does not support a finding that in the transactions with the Western Electric Company there was an abuse of the discretion of the directors and officers of the Illinois Company which constitutes either a fraud or an injury to the public. Other objections of the city go to the alleged lack of integrity of the plant account through failure to credit retirements, the method by which retirement costs were determined and the method of handling reused material. Those objections are not sustained by the record and are without substantial

merit. The record shows original cost, as of June 30, 1923, to be $101,626,014.

As to reproduction cost, the Commission found the reproduction cost new, exclusive of working capital, materials and supplies, work in progress, and going value, but including overheads, as of December 31, 1922, was $128,769,000. There is no rational basis in the record for that finding unless there is added $8,292,869, the amount of the net additions for the year 1922, which was obviously overlooked by the Commission in making its finding. There should also be added the net additions from January 1, 1923, to June 30, 1923, amounting to $9,938,198. This makes the reproduction cost new as of June 30, 1923, approximately $147,000,000. The evidence of the company is that the value of the property as of June 30, 1923, was $145,248,344. The city, dissenting again from the findings of its co-defendant, the Commission, has devoted a large part of its evidence to objections to the method by which the company's claim of value was established.

No field inventory or appraisal was made. The property of the company had been appraised in 1911 and this appraisal was taken as the starting point. Factors were applied to this appraisal and the net additions thereto representing the actual increases, respectively, of the prices of labor and material entering into the construction of the property from year to year to June 30, 1923. It is claimed by plaintiff that the cost of reproducing the property new as of June 30, 1923, would be at least the amount determined by the appraisal made as above stated. Stress is placed upon the well-known facts concerning increase in labor and material costs during and after the world war of which the court will take notice, and the increasing difficulties of construction which would have been met by a reproduction of the entire property under conditions existing in Chicago in 1923. Assuming the correctness of the 1911 inventory and appraisal and the accuracy of the company's books and conversion factors, we see no reason why the appraisal of June 30, 1923, does not furnish a reasonably accurate basis for determining a minimum reproduction cost. The same method of appraisal based upon actual construction costs of the company was used in its proceedings before the Public Utilities Commission and before the Illinois Commerce Commission, both of which Commissions determined the reproduction cost new of the company's property on the basis of these appraisals.

The testimony of the plaintiff's engineers and accountants satisfies us that the computations are based upon data which are substantially correct. It has not been met, in our opinion, by the criticism of the expert witnesses produced by the defendants. Those criticisms are weakened by the conflicting statements of the witnesses and the contradictions found in correspondence and testimony in other cases. While under some circumstances this method might not be a reliable guide to true reproduction costs, we think that for this plant and with this company's books and supporting data it shows clearly that the reproduction cost new of the physical prop-

erty as of June 30, 1923, was at least $145,000,000.

Plaintiff asserts that the allowance by the Commission of $4,196,067, for going value is inadequate. This was the amount found by the Public Utilities Commission in arriving at its minimum value of the company's property in 1919—about 4 per cent of the reproduction cost. If the same percentage is applied to the reproduction cost in 1923, the allowance for going value is increased to $5,800,000. The Commission, in determining going value, rejected from consideration items aggregating more than five million dollars on the ground that they had been charged to operating expense and the company reimbursed therefor. The method followed by the Commission is questioned by plaintiff. (Lincoln Gas & E. L. Co. v. Lincoln (1919) 250 U. S. 256, 63 L. ed. 968, 39 Sup. Ct. Rep. 454; Public Utility Comrs. v. New York Teleph. Co. (1926) 271 U. S. 23, 70 L. ed. 808, P.U.R.1926C, 740, 46 Sup. Ct. Rep. 363.)

The city's claim that there should be no allowance for going value cannot be sustained on the record in this case. (McCardle v. Indianapolis Water Co. (1926) 272 U. S. 400, 414, 71 L. ed. 154, P.U.R.1927A, 15, 47 Sup. Ct. Rep. 144; Des Moines Gas Co. v. Des Moines (1915) 238 U. S. 153, 165, 59 L. ed. 1244, P.U.R. 1915D, 577, 35 Sup. Ct. Rep. 811; Denver v. Denver Union Water Co. (1918) 246 U. S. 178, 191, 62 L. ed. 649, P.U.R.1918C, 640, 38 Sup. Ct. Rep. 278.) It is not necessary in determining the issue of confiscation here to do more than to find that $4,196,067, the amount allowed by the Commission, is the minimum allowance which can be made for going value.

As to the deduction for depreciation in the valuation of the property, only two possible bases are found in the record. The one is the contention of the company, supported by the evidence and the finding of the Commission, that the property is in 90 per cent condition. This results in a deduction of $14,500,000, making the reproduction cost new, less depreciation, $130,500,000. The other basis is to accept the claim of the defendants that $26,000,000, the entire amount of the property paid for from the depreciation reserve and eliminated by the Commission from its valuation of the property should be deducted. This makes the reproduction cost new, less depreciation, $119,000,000.

If the first basis for estimating depreciation is accepted we have the following elements to which consideration must be given in determining the rate base: Original cost $101,600,000; reproduction cost new of physical property, less depreciation $130,500,000; working capital $3,000,000; going value $4,200,000.

The valuation of $96,000,000 found by the Commission, as of December 31, 1922, or $106,000,000 as of June 30, 1923, if the net additions from January 1, 1923, to June 30, 1923, are added is clearly insufficient, and shows that proper consideration was not given to the element of reproduction cost new. (St. Louis & O'Fallon R. Co. v. United States (1929) 279 U. S. 461, 484, 73 L. ed. 798, P.U.R. 1929C, 161, 49 Sup. Ct. Rep. 384; McCardle v. Indianapolis Water Co.

supra; Bluefield Water Works & Improv. Co. v. Public Service Commission (1923) 262 U. S. 679, 691, 692, 67 L. ed. 1176, P.U.R.1923D, 11, 43 Sup. Ct. Rep. 675; Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission (1923) 262 U. S. 276, 67 L. ed. 981, P.U.R. 1923C, 193, 43 Sup. Ct. Rep. 544, 31 A.L.R. 807.)

Certainly a valuation of less than $125,000,000 (estimating the depreciation at 10 per cent would amount to confiscation. The amount available for return in 1923 under the rates in force, on the company's showing, was $6,280,000. If to this is added $360,000 deduction from the payment under the license contract and $1,800,000, the Commission's deduction from allowance for the expense of depreciation, there would be available for return $8,440,000. The deduction for an entire year under the rates established by the Commission would have been $1,700,000, leaving $6,740,000 available for return. This is a return of less than 5½ per cent and clearly confiscatory under conditions existing in 1923 (McCardle v. Indianapolis Water Co. *supra,* at p. 419 and cases cited in Note 4; United R. & Electric Co. v. West (1930) — U. S. —, 74 L. ed. —, P.U.R.1930A, 225, 50 Sup. Ct. Rep. 123.)

If the entire $26,000,000 is deducted for depreciation there would be a corresponding reduction in the rate base to $113,500,000. But the company is not to be subjected to an arbitrary rule by which it is charged with the full depreciation reserve in valuing its property and denied the benefit of making the yearly charge entering into that reserve as an expense of depreciation. On that basis the deduction of $1,800,000 from the expense of depreciation is unwarranted, and the amount available for return under the rates fixed by the Commission would be $4,940,000. This is a return of less than 4½ per cent.

We are not to be understood as approving the deduction of $360,000 from the payment under the license contract or that of $1,800,000 from the expense of depreciation, or of holding that the evidence does not warrant a higher valuation than $125,000,000. We have not undertaken to decide disputed questions where it is apparent that in the view most favorable to the defendants, the return to the company would still be inadequate. (Denver v. Denver Union Water Co. *supra.*)

The defendants assert that the plaintiff does not come into equity with clean hands. The record does not sustain the accusations made in support of that charge.

The order was made in 1923. Since that time the Commission has taken no steps to examine the matters reserved in the order for further consideration or to determine a rate base by a method which is not, on its face, unreasonable and arbitrary. The defendants have sought repeated delays and attempt to take advantage of them by projecting the effect of the order of 1923 to a time when changed conditions require another investigation by the Commission, if new rates are to be established. The finding of confiscation in 1923 applies with increasing force to the succeeding years. Considering the attitude of the defendants as to the trial of

the case and the effect of a decree for the defendants, a court of equity will scrutinize this record with great care before making an order which will require the plaintiff to refund more than eleven million dollars.

The case, however, does not appear to us to be a doubtful one, even on assumptions as favorable to the defendants as it is reasonably possible to make, and the temporary injunction is made permanent.

WISCONSIN RAILROAD COMMISSION

Re Thorp Telephone Company

[U–3870.]

Rates — Telephones — Special charge for night calls.

1. A charge of 10 cents directed by the Commission to be placed on all telephone calls at a certain exchange during certain night hours was held to apply only to local calls and not to toll calls, where such charge was made only for the purpose of deterring the unnecessary use of emergency night service, p. 167.

Discrimination — Telephone rates — Special charge for night calls.

2. A charge of 10 cents placed at the order of the Commission against telephone calls during certain night hours was held not to be discriminatory when applied only to local calls and not to incoming or outgoing toll calls where such charge was made with the purpose of deterring the unnecessary use of night service, p. 167.

[January 28, 1930.]

INVESTIGATION *by the Commission on its own motion into the practices of a telephone company with reference to handling toll messages; order entered.*

By the COMMISSION: [1, 2] This investigation on motion of the Commission was brought about by the attitude of the Thorp Telephone Company in the matter of complying with a previous order of the Commission, U-3797. In that decision the hours of regular service were specified and a charge of 10 cents was allowed for all calls made between 10 P. M. and 6 A. M. from April 1st to November 1st and between 9 P. M. and 7 A. M. from November 1st to April 1st. In complying with this order the utility endeavored to apply the 10-cent charge to incoming toll calls after the regular hours of service and, not meeting with co-operation in this matter, refused to accept and complete such calls. The Commission advised the Thorp Telephone Company that its order did not contemplate the application of the 10-

cent charge on such incoming toll calls but to this the utility demurred.

A hearing in the matter was held in the village hall of Thorp, Wisconsin, on October 25, 1929. The Thorp Telephone Company was represented by Mr. M. Lund, secretary-treasurer, and J. M. Lund, manager. There were no other appearances.

The utility contended that a discrimination would result if a 10-cent charge was made for outgoing calls after the hours of regular service, but not for incoming calls. It may be well to point out here that the primary purpose of this charge was not to meet the special costs involved but to act as a deterrent to unnecessary and unimportant calls. It is clear that any toll call which would cost 10 cents or over would have the same deterrent effect of reducing or eliminating unnecessary calls. It is, therefore, not necessary to apply this charge to either incoming or outgoing toll calls, although its desirability in connection with local calls is not questioned.

In general, toll rates are designed to meet the costs of toll service and are apportioned to the utilities involved in proportion to the costs incurred. The Commission does not feel that an unreasonable discrimination, as contemplated under the Public Utility Law, would result if the added costs of the special night service in this case were required to be met in the general rate schedule, except in so far as the 10-cent charge on local calls would contribute toward these costs. The subscribers all share in the benefits resulting from the service which in effect establishes 24-hour service for emergency and other important calls.

As was stated in the previous order of the Commission, if it is found that the company cannot continue this service under its present rates, application may be made for a revision thereof.

It is therefore *ordered* that the Thorp Telephone Company apply the 10-cent charge provided in the Commission's order dated April 18, 1929, only to local calls made after stipulated hours of regular service and that both incoming and outgoing toll calls shall be handled without additional charge.

MICHIGAN PUBLIC UTILITIES COMMISSION

Re Southern Michigan Transportation Company

[D-2083.]

Valuation — Book cost and present fair value — Basis for securities.

1. The present fair value and not the price paid for public utility property is the determining factor in ascertaining value for the purpose of the authorization of securities, p. 170.

Valuation — Going value — Good will.

2. The Commission refused to allow for good will a sum in excess of 10 per cent of the actual physical value of a transportation company's property for the purpose of authorizing security issues, where it was not shown whether such item was intended to cover going value or that element of value attaching to a permit issued by the Commission, p. 170.

Valuation — Going value — Transportation utility.

3. The commission refused to allow a sum in excess of 10 per cent of the physical value of a transportation utility's property for going concern value, p. 170.

Valuation — Capitalization of permit — Transportation utility.

4. The Commission refused to allow an intangible amount as capitalization of a permit issued by the Commission to a transportation utility in ascertaining value for the purpose of authorizing securities, p. 170.

[January 20, 1930.]

APPLICATION *of a transportation company for authority to increase capital stock; granted with restrictions.*

By the COMMISSION: The petitioner in this cause is the Southern Michigan Transportation Company. Its application was filed October 19, 1929, and the hearing on the same held October 31, 1929. Applicant requested of this Commission the authority to increase by amendment to its articles of association its capital stock from 1,000 shares of non-par value stock at a declared value of $10 per share, to 10,000 shares of non-par value stock of a declared value of $100 per share, and to file said amendment in the office of the secretary of state; the authority to exchange the original 1,000 shares of non-par stock, at a declared value of $10 per share, for 100 shares of said newly created non-par stock at the declared value of $100 per share; the authority to issue 6,080 shares of said newly created non-par value stock, at the declared value of $100 per share, in exchange for property as follows:

For real estate described in the application, $113,000; for all the assets of the Rapid Transportation Company $267,177.79; in payment of stock dividend in the amount of $15,822.21; which amount will be transferred from accumulated surplus to the capital account; and the balance of $212,000.00 in settlement of account with the Michigan Electric Shares Corporation, which corporation owns all of the stock of the Southern Michigan Transportation Company except the directors' qualifying shares; and for authority to issue and sell for cash only to its stockholders the remainder of said 10,000 shares of said newly created non-par stock at the declared value of $100 per share, or 3,820 shares of said value of $100 per share, or $382,000.

The Commission, after considering all the evidence that was presented before it in connection with the application, was satisfied with the showing made by the applicant, but there was one point in the capital set up

which claimed the attention of the Commission and on which they refused to rule favorably.

Petitioner, as above stated, requested permission to issue $267,177.79 of its said non-par value stock in exchange for all the assets of the Rapid Transportation Company, the sum total of which assets, it claims, equals the above mentioned figure and amount. The tangible or physical assets of the said Rapid Transportation Company, according to applicant's exhibits are $78,047.64. The petitioner claims that the balance of said sum of $267,177.79, or $169,120.15, should be made the basis of capitalization as an intangible asset—in this case goodwill.

[1] The fact that a certain amount of money may have been paid for a public utility property has never been regarded by this Commission as a factor in valuation. The found valuation, and not the price paid, has been the determining factor with this Commission, whether the matter for consideration was a proceedings for the determination and establishing of rates or for the consideration of the authorization of securities.

[2–4] This Commission has recognized going value as an element of value to be considered in the arriving at the valuation of public utility property, and this has generally been allowed in an amount equal to about 10 per cent of the actual physical value of the property in question. Here, evidently, by goodwill is meant something akin to going value. Were the Commission in the instant case disposed to grant an allowance for goodwill, in accordance with the prayer of the petition, it would have to allow goodwill in the amount of $189,120.15, when, as stated, the tangible or physical assets of the company total but $78,047.64. Such an allowance for goodwill in any case would be entirely out of proportion and out of the question and that from any standpoint.

We will now consider the question of what the applicant has styled goodwill in any amount. Said applicant has not defined what it means by goodwill. If by goodwill in this connection is meant an element of value attaching to a permit issued by this Commission in accordance with the provisions of Act Number 209 of the Public Acts of 1923, this Commission does not consider this as being a basically sound proposition. It is tantamount in effect to capitalizing the permit itself, and the Commission does not see where there is anything about such a permit that can be made the basis of capitalization.

If, on the other hand, the applicant by goodwill means going value as an intangible element of value beyond its physical assets, it has not so stated, and there has been no data presented to this Commission by which it might measure the magnitude and amount of such element of value. The magnitude, extent, and amount of such element of value is certainly not the above mentioned sum of $189,120.15, and if goodwill here is what has been considered going value in many other utility cases and has been established as about 10 per cent of the value of the physical assets, then such percentage would be the maximum value in the instant case.

Under the conditions as above outlined and set forth, this Commission

is of the opinion that it should not allow stock of applicant to be issued in exchange for the property of the Rapid Transportation Company in excess of the clear value of its tangible and physical assets, the amount of which, as aforestated is $78,047.64.

The Commission having made this decision, it is, therefore, necessary in this order to reduce the number of shares of non-par stock at the value fixed of $100 per share to be issued in exchange for property from 6,060 shares to 5,140 shares and to effect other changes in the corporate set up as will appear hereinafter.

This point having been disposed of and the necessary amendments to the applicant's corporate set up having been made, this Commission is of the opinion that the proceeds to be derived from the sale of said non-par stock are to be used only for the lawful corporate purposes of said applicant, and that the increase of said stock and its issuance, sale and exchange is reasonably necessary for and essential to the successful carrying out of the lawful corporate purposes of said corporation.

Said petitioner has paid into the treasury of the state of Michigan the sum of $990, the fee required by law in such case made and provided.

VERMONT PUBLIC SERVICE COMMISSION

Re Green Mountain Power Corporation

[No. 1564.]

Re Burlington Electric Light Department

[No. 1565.]

Rates — Charge as affected by use of current — Electricity.

1. An electric rate schedule based on varying prices according to the use made of the current is indefensible where the cost of the current to the company is the same regardless of the use made of it, and where such a schedule requires the unnecessary expense of two or more meters, p. 174.

Rates — Kinds — Popular misunderstanding — Electricity — Room count.

2. A proposed electric rate schedule including a charge per counted room without the inclusion of any electric current, while recognized as economically justified, was held to be unwise, in view of popular misunderstanding of its purposes, and a minimum charge per counted room was substituted therefor, p. 175.

Rates — Uniform schedules — Electricity.

3. A newly consolidated electric company serving over fifty closely connected communities within a single state was required to place into effect a uniform schedule of domestic rates for the entire area served by it, p. 176.

Consolidation, merger, and sale — Necessity for reduction of rates as a justification.

Statement that utilities must justify mergers in the public mind by rate reductions, in view of the contention by the utilities that such mergers are means of obtaining lower costs, p. 174.

Rates — Room count — Promotional electric rates.

Electric rates permitting customers living in small houses to obtain the benefit of lower charges sooner than those allowed large house owners for the same amount of current used were said to be promotional as inducing a larger use of electricity and to have proved generally satisfactory, 176.

[January 13, 1930.]

PETITIONS *by consumers of an electric utility for reduced rates; rates adjusted.*

APPEARANCES: Hon. J. Ward Carver, Attorney General, and C. O. Granai, State's Attorney, for the state of Vermont; Deane C. Davis and W. W. LaPoint, for the city of Barre; T. E. Hopkins, for the Burlington petioners; J. H. Allen, for Essex Junction; George L. Hunt, for the city of Montpelier; Charles B. Adams, for Waterbury; Howard C. Bennett, for Williston; George W. Stone, for Vergennes; Fred E. Gleason, for Green Mountain Power Corporation.

By the COMMISSION: Under the authority of Joint Resolution No. 222, approved March 15, 1929, directing an investigation by this Commission "into the existing rates charged for electricity with a view to effect a reduction and uniformity in such rates," we made a study of the residential rates of the Green Mountain Corporation which revealed a widespread differential in the prices charged for domestic service in different municipalities, numbering over fifty cities, villages, and towns covering a cross section of the state from Vergennes and Burlington on the west up the Winooski River Valley and thence to Wells River Junction on the east. To illustrate, these present rates are as follows:

Montpelier District

Lighting. Effective August 1, 1920.
- First 50 kw. hr. per month @ $.12 per kw. hr. net.
- Next 450 kw. hr. per month @ $.08 per kw. hr. net.
- Excess over 500 kw. hr. per month @ $.07 per kw. hr. net.
- Minimum $1 per month.

Cooking, heating, and refrigeration but not for light. Effective January 1, 1921.
- First 10 kw. hr. per month @ $.10 per kw. hr. net.
- Excess over 10 kw. hr. per month @ $.03 per kw. hr. net.
- Minimum $2 per month.

Burlington District

Lighting. Effective June 1, 1907.
First 50 kw. hr. per month @ $.10 per kw. hr.
Second 50 kw. hr. per month @ $.06 per kw. hr.
Next 900 kw. hr. per month @ $.05 per kw. hr.
Less 5% discount on bills paid within 10 days.
Minimum $.50 per month.

Power. Effective March 1, 1908.
First 200 kw. hr. per month @ $.05 per kw. hr.
Second 200 kw. hr. per month @ $.04½ per kw. hr.
Third 200 kw. hr. per month @ $.04 per kw. hr.
Less 5% discount as above.
Minimum $1 per month.

Cooking. Effective September 1, 1922.
$.03 per kw. hr.
As per letter of Jan. 29, 1930.
Minimum $2.50 per month.

Vergennes District

Lighting. Effective October 6, 1917.
Same as Burlington.

Power. Effective February 5, 1921.
Same as Burlington except minimum is $.50 per month.

Cooking. Effective May 1, 1923.
Same as Burlington less 5% discount on bills paid within 10 days.

Wells River District

All domestic use—light, power, and cooking. Effective January 1, 1925.
First 5 kw. hr. per month @ $.20.
Next 45 kw. hr. per month @ $.11.
Excess over 50 kw. hr. per month @ $.03.

The effective dates of these Burlington Light & Power rates antedated any jurisdiction over this subject by this Commission. Whatever supervision, if any, there might have been at that time was in the municipality.

The Green Mountain Power Corporation is the result of consolidations and mergers of electric properties commenced in the summer of 1926 when the Foshay interests purchased the Vergennes Electric Company authorized to operate in Vergennes, Ferrisburg, Charlotte, Shelburne, South Burlington, Waltham, New Haven, and Panton. At this time the name was changed to the Peoples Hydro-Electric Vermont Corporation which purchased early in 1927 the Montpelier & Barre Light & Power Company authorized to operate in Duxbury, Waterbury, Moretown, Fayston, Waitsfield, Warren, Northfield, Berlin, Williamstown, Washington, Orange, Barre, East Montpelier, Plainfield, Middlesex, Peacham, Worcester, Calais, Marshfield, Cabot, and the cities of Montpelier and Barre. Shortly after the purchase of the Montpelier & Barre Light & Power Company, W. B. Foshay Company sold its interest in these properties to G. L. Ohrstrom & Company of New York city. In September of 1927, the Peoples Hydro-Electric Vermont Corporation purchased the Eastern Vermont Public Utilities Corporation operating in Groton, Ryegate, South Ryegate, Wells River, McIndoes, Barnet, West Danville, Vermont, and Monroe, New Hampshire. In 1928, the Peoples Hydro-Electric Vermont Corporation purchased the Burlington Light & Power Company authorized to operate in Jericho, Richmond, Williston, South Burlington, Essex Junction, Essex Center, Fort Ethan Allen, and the cities of Burlington and Winooski. In allowing each of these sales of electric properties, this Commission has found, as required by General Laws, § 4982, that the public good of the state would thereby be promoted. While this consolidation with the additions of new plants, storage reservoirs, and the further connecting up of the entire system by transmission lines has improved the service, there has been no reduction of domestic rates. The old

schedules, perhaps justified when they were first inaugurated by companies then doing a purely local electric business, have been continued in effect without any move on the part of the consolidated company to change and bring them up to date.

In order to correct this situation, this Commission on August 14, 1929, refused to render its decision on petition for a certificate to the effect that an amendment to the articles of association of the Green Mountain Power Corporation increasing its capital stock would promote the general good of the state until the company had filed new and more uniform and reduced rates for residential service. In this matter we found ourselves in complete accord with the statements of Matthew S. Sloan, president of the National Electric Light Association, who, in his address delivered last September before the New England Geographic Division of this association at New London, Connecticut, stated that, since mergers of operating companies and extension of holding company participation in utility development is one means of obtaining lowered costs, the utilities must justify mergers in the public mind by rate reductions. Since companies dealing in oil, gasoline, groceries, and other commodities like the Standard Oil Company and chain stores find it good business to sell their products at a uniform price throughout this state, it is difficult to understand why the same policy should not be successfully followed by an electric utility serving over fifty towns and cities.

[1] From another aspect the present rates are indefensible in that they are based on varying prices according to the use made of the current which costs the company the same whether the electricity is used for light, power, or heat. Such rates are further objectionable because they require the unnecessary expense on the part of the company of maintaining and reading two or more meters and in some cases on the part of the customer of additional wiring.

October 31, 1929, the Green Mountain Power Corporation filed new schedules, Rates R, effective December 1, 1929, superseding all existing rates applicable to residential service for the cities of Burlington, Winooski, Montpelier, and Barre, covering all electric service in private residences and individual apartments, including lighting, cooking, heating, refrigeration, and appliances. This rate was substantially as follows:

(a) $.20 per counted room per month. Minimum of four counted rooms, maximum of eight counted rooms, plus
(b) $.05 per kw. hr. for the first 5 kw. hr. per month per counted room.
(c) $.03 per kw. hr. for all other energy.
All rooms used for living purposes to be counted, except alcoves, unfinished attics, barns, bathrooms, cellars, closets, garages, hallways, laundries, pantries, porches (not enclosed), sheds, etc. Minimum four rooms; maximum eight.
Minimum monthly charge: $.20 per counted room but not less than $.80 per month.

At the same time the company filed Schedule R–2 applicable to all territory except the said four cities which was identical with the above rate except that (b) was $.055.

October 31, 1929, the city of Burlington electric light department operating an electric distribution system throughout Burlington in direct competition with the Green Mountain Power Corporation filed domestic

rates in all points identical with Schedule R of the Green Mountain Power Corporation. The present rates of the city are the same as the present rates of the Green Mountain Corporation except that a 5 per cent discount for prompt payment is allowed on the 3-cent cooking rate.

Petitions objecting to these rates having been filed before the effective date thereof by customers of both the Municipal and Green Mountain residing in Burlington and patrons of the latter living in Barre, Essex Junction, Williston, Waterbury, and Vergennes, an order of suspension was issued postponing the effective date until the questions involved were finally determined.

At the hearing objections developed from customers residing in Vergennes, Waterbury, and Essex Junction against the proposed one-half cent differential in the first step of energy charge for the reason that large generating plants of the Green Mountain Company were located as near as or nearer to these municipalities than the plants serving some of the four favored cities. The company, therefore, withdrew this differential as applied to Vergennes, Waterbury, and Essex Junction.

[2] The storm center of the new schedules, however, was the service charge of 20 cents per counted room without the inclusion in it of any electric current. This innovation in electric rates in this state was not understood by the objectors nor by the public generally, and, while we recognize that it has some advantages and is apparently working satisfactorily in other states, we think that because of its novelty here it is not advisable to adopt it at this time and under these circumstances. The popularity of a new rate is largely a matter of salesmanship on the part of the utility initiating the rate. We think it clear that this service charge was not successfully sold to the public.

On all the evidence presented, we are of the opinion that a fair and reasonable domestic rate for all the territory served by the Green Mountain Power Corporation except in the city of Burlington where it is in direct competition with the municipal plant would be the following schedule:

Residence Service

Character of Service:

Continuous. Alternating current, 60 cycle, single phase, with 2 or 3 wire, 110–220 volts at option of the company.

This rate is only applicable for electric service in private residences and individual apartments, including lighting, cooking, heating, refrigeration, and appliances. Motors to an aggregate approved by this company will be permitted under this rate.

Rate:

$.095 per kw. hr. for the first 5 kw. hr. per month per counted room.

$.07 per kw. hr. for the next 3 kw. hr. per month per counted room.

$.03 per kw. hr. for all other energy.

Determination of Number of Rooms:

All rooms used for living purposes will be counted, except alcoves, unfinished attics, barns, bathrooms, cellars, closets, garages, hallways, laundries, pantries, porches (not enclosed), sheds, etc. In detached buildings each room used for living purposes will be counted. Minimum, 3 rooms; maximum, 8 rooms.

Term of Contract: One year.

Minimum Monthly Charge:

$1 per month for any service rendered under this rate except as hereinafter provided:

$3 per month for lighting service in combination with electric ranges or electric water heaters or both.

Meters:

Under the above rate the company will install one or more meters at its option.

Terms:

The above rate is net, billed monthly and payable upon presentation of bill.

Short Term Service:

For summer or short term service of less than twelve months, a charge of not less than $2 will be made for connecting and disconnecting short term customers' service.

Option:

At his option any residential customer, who, upon the date these rates become effective, is using two meters, one for lighting and one for heating or cooking, may elect for a period of one year, if the company is notified in writing on or before January 20, 1930, to remain on the present rates for light, heating, and cooking.

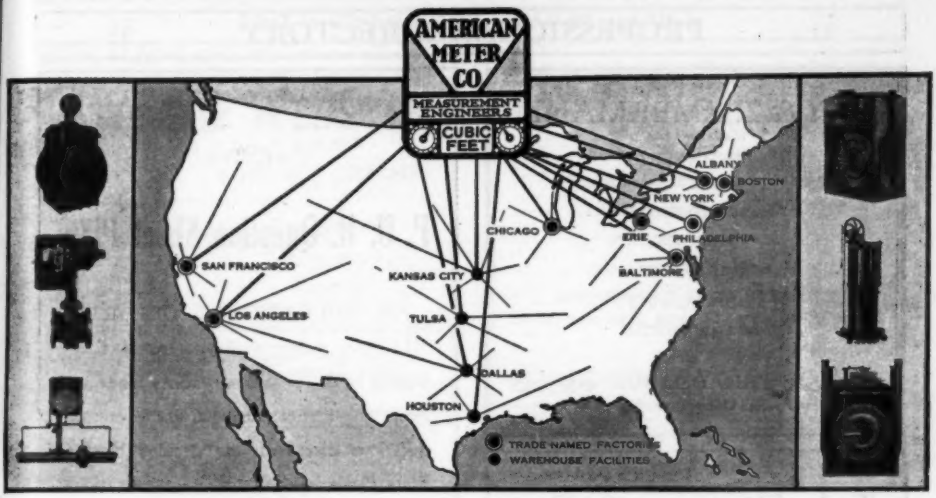
Because of the competitive situation in the city of Burlington, we order that the above rates be made applicable in the city of Burlington to the Green Mountain Power Corporation and the Burlington Electric Light Department except that in this city there shall be given a 5 per cent discount on monthly bills exceeding the said monthly minimums, provided payment is made within ten days after the date of the bill.

Rates similar to the above based on three steps for the energy charge according to the number of rooms in a house with a minimum monthly charge have been in effect in St. Johnsbury since December, 1926, and in Bennington since June, 1928. Another block room rate having four steps in the energy charge with a monthly minimum charge for lighting of $1 and for lighting and cooking of $3 has been in effect in over seventy Vermont municipalities served by the Central Vermont Public Service Corporation since October 1, 1929. These rates permit the customer living in a small house to obtain the benefit of the lower charges sooner than is allowed the large house owner for the same amount of current used. They are, therefore, promotional and, generally speaking, induce a larger use of electricity by the householder at rates considerably less than the present rates. These rates have proved generally satisfactory.

The option given the customer now on a lighting and cooking rate to continue on these rates if they prove to be lower than the new rate should prevent any increase to this class, but we believe that, as the use of electricity becomes more general, an increasing number of combination consumers will find it to their advantage to take the new rate.

We find that the present monthly minimum of $.50 for lighting service in the Burlington and Vergennes districts is unwarranted and should be raised to $1.

[3] In effecting this new schedule for domestic service applicable to the whole territory served by the Green Mountain Company, we have approached the problem from a state and not a local point of view because we are convinced that this is the only just and reasonable method of regulating a service extending across the state furnishing electricity to over fifty municipalities. We submit that the question of just and reasonable rates as presented in this case is something more than a Babel of different local rates, otherwise the legislature would have allowed the rate-fixing power to remain in the municipalities where it originally was. Perfect equality in operation cannot be accomplished by any rate structure. We become accustomed to the inequities of the old rates and are perhaps prone to exaggerate the inconsistencies of the new. Occasional hardships will be found in any rate. It is largely a question of degree.



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